



CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON
APPEAL FROM THAT COURT'

L. J. ROBERTSON, *Barrister-at-Law*.
W. L. WILSON, *Barrister-at-Law (Acting)*.

PRIVY COUNCIL J. V. WOODMAN, *Barrister-at-Law.*

HIGH COURT, BOMBAY ... { B N LIANG, *Barrister-at-Law.*
KENNETH McI. KEMP, *Barrister-at-Law (Acting).*
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HON. MR. T. J. SIRANGMAN (*Advocate-General*).

„ M. R. JARDINE (*Acting*).

MR. L. C. CRUMP (*Legal Remembrancer*).

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ORIGINAL CIVIL.

Before Mr Justice Chandavarkar and Mr Justice Batchelor.

In re THE INDIAN ARBITRATION ACT, 1899, AND *In re* ARBITRATION BETWEEN THE ATLAS ASSURANCE COMPANY, LIMITED, AND OTHERS AND AHMEDBHOY HABIBBHOY. THE ATLAS ASSURANCE COMPANY, LIMITED, AND OTHERS, PETITIONERS, *v.* AHMEDBHOY HABIBBHOY, CLAIMANT AND RESPONDENT *

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Letters Patent, 1865, clause 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss.

An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.

Per CHANDAVARKAR, J.—When a submission to arbitration is being construed, a cardinal principle to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to which the submission relates decided by a Court of law. It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself.

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The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred.

Montoya v. London Assurance Company(1) referred to.

The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other Companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration but when the order which the Court passes is only an intimation to the arbitrators of its opinion on the question of their jurisdiction it is immaterial whether all or some of the Companies are formally parties to the proceedings in appeal.

As to the objection that, even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to a signatory.

Per BATCHELOR, J. :—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate cause *sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the companies after the loss by fire or water had become an accomplished fact.

APPEAL from an order of Davar, J., dated the 23rd January 1908.

The respondent, Mr. Ahmedbhoy Habibbhoy, was the owner of certain premises situate at Fergusson Road, wherein previous to October 1906 there was a mill known as the Victory Mills; this property was insured with 19 Insurance Companies for various

(1) (1851) 6 Ex. 451 at p. 458.

amounts against loss or damage by fire. On the 14th of October 1906, there was a fire on the mill premises and loss and damage was caused to the property insured. The respondent made his claims against the Companies. By nineteen different agreements made by each of the Companies on the one part and Mr. Ahmedbhoy on the other part the matters were referred to the arbitration of Mr. Armstrong and Mr. Dwarkadas Dharamsey. The arbitration proceedings having reached a certain stage a difference of opinion arose as to the admissibility of certain evidence tendered by the respondent. After a very elaborate argument before them, the arbitrators decided to admit the evidence. Their decision ran as follows:—

“Without in any way deciding the question as to whether or not, any, and if so, what, consequential damage could be awarded to the claimant under the contract of assurance we hold that evidence of the nature offered to be produced on behalf of the claimant and objected to by Mr. Chamier on behalf of the Companies is allowable for the purposes of the subject matter of the reference. We think that it is open to the claimant to contend that under the Policy the Companies did take possession and they were bound to protect and clean the machinery.”

On this decision being given the Companies presented the present petition wherein amongst other things they prayed that they might be allowed leave to revoke the submission to arbitration and in the alternative they prayed that:—

“In the event of Your Lordship being satisfied that the arbitrators will comply with Your Lordship’s directions and ruling as to the proper course to be pursued, Your Lordship will rule that the arbitrators had acted wrongly in law and have intimated their intention to act in future and have erred in the manner complained of in paragraphs 21, 22, 23 hereof, that Your Lordship will rule and direct the arbitrators as to the course that it is their duty to take and pass no further order on this petition beyond intimating to the arbitrators that they should order the said Ahmedbhoy Habibbhoy to pay all costs of proceedings before them caused by and incidental to the attempt made on behalf of the said Ahmedbhoy Habibbhoy to adduce the said evidence and of the objection thereto and of this petition which was necessitated thereby.”

Mr. Justice Davar dismissed the petition with costs.

Against this order one of the petitioners, the Bombay Fire and Marine Insurance Company, filed an appeal on the following grounds:—

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(1) That the learned Judge erred in not complying with one or other of the prayers of the petition. (2) That the learned Judge erred in declining to comply with the alternative prayer in the petition on the ground that he had no power to enforce his ruling or directions if the arbitrators should not choose to follow or obey them. (3) That the learned Judge erred in refraining from expressing any opinion on the merits of the question raised before him by the petitioners

Strangman, Advocate-General, with him *Chamier*, for the appellant.

Inverarity (with him *Lowndes*) for the respondent raised a preliminary objection that no appeal lay. The arbitrators have up to this moment decided nothing, they only say we are entitled to contend what we do. We say they are liable not only for damage at the actual moment the fire occurred but also for their not taking care of the machinery after the fire when and after they took possession. We want to show that the damage now is a good deal greater than it was when they first took possession. We say that as the arbitrators decided nothing and as the Court below was asked either to revoke the reference or to express an opinion and refused to do either, there is not a judgment; nor is there a decree and therefore no appeal lies. Our next objection is that only one of nineteen appellants have appealed. The other eighteen have not been joined as respondents. The appellant therefore cannot appeal on behalf of those eighteen.

Strangman :—This argument is based on a fallacy, namely, that the arbitrators decided nothing.

[CHANDAVARKAR, J. :—Mr. *Inverarity* says that the arbitration Act gives the judge a discretion, that he has exercised that, and that we cannot interfere.]

Strangman :—It is necessary to go into the facts before one can appreciate what our position is. The respondent insured with nineteen different Companies in respect of the Victory Mills. On the 14th October 1906 a fire took place. A claim was made and assessors were appointed, one by each of the parties. In February 1907 the assessors made a joint report, Ahmedbhoy was dissatisfied, there was an agreement to refer to arbitration on 28th May 1907. The proceedings commenced and before the arbitrators it was contended that the Companies entered into

possession and subsequent to possession there was great loss and damage, it was contended that the arbitrators were to decide not only the loss caused by the fire but all subsequent loss and damage including loss due to want of cleaning. This was strenuously argued and the arbitrators gave their decision. What does this decision mean? They say that they propose to find that if the Companies did take possession they would make the Companies liable for the damage caused by the neglect to clean. When we look at the reference we see that it does not contemplate anything of the sort.

[CHANDAVARKAR, J.:—Your argument comes to this that the moment the arbitrators say that it is open to contend they admit that the point is within the reference.]

Strangman :—Exactly that: see clauses 10, 11, 17 of the Policy of the General Accident Insurance Company and see the reference, damage under the policy is damage due to the fire, *i.e.*, at the time the fire occurred and was extinguished. An attempt was made to extend the scope of the reference. There is a good deal of correspondence which shows what our attitude has been. We do not say that Ahmedbhoy has not got a right of action against the Company, but that this reference has nothing to do with it. Loss and damage intended to be referred to was simply loss and damage caused by fire and nothing more. Ahmedbhoy tried to widen the scope of the reference, and that is what we objected to.

[BATCHELOR, J.:—There might be a doubt in the minds of the arbitrators as to whether there was not a difference between “consequential loss” and damage due to neglect in cleaning.]

Strangman :—I take my stand on the last sentence of the arbitrators’ decision. There is no damage contemplated under clause 11 of the policy. Supposing a mill insured for one lac and worth eight lacs. Fire causes loss of one lac and over. The Company goes into possession and is guilty of gross neglect so as to cause loss of two or three lacs. The reference could not go beyond one lac because that is all that is covered by the policy. See Indian Arbitration Act, section 5.

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[CHANDAVARKAR, J. :—Davar, J., says that the only thing before his mind was the complaint that there was an improper reception of evidence.]

Strangman :—We say the learned Judge did not grasp the point. He says the arbitrators decided nothing. That is the fallacy.

[BATCHELOR, J. :—What is the right that is denied to you?]

Strangman :—The right to revoke the submission. See *Hart v. Duke*⁽¹⁾. Our case is much stronger than this. *East and West India Dock Company v. Kirk*⁽²⁾, *Robinson v. Davies*⁽³⁾. *Scott v. Van Sandau*⁽⁴⁾ is an entirely different case to the present one. It only dealt with the improper reception of evidence. Here the arbitrators want to go outside their reference.

[BATCHELOR, J. :—What is there to prevent you from coming before the Court after the award is made to have it set aside on the ground that the arbitrators have exceeded their jurisdiction?]

Strangman :—We could not do so, because supposing they awarded to Ahmedbhoy fifteen lacs on his claim of twenty lacs how could we come before the Court and satisfy it that such and such amounts were allocated to items beyond the jurisdiction of the arbitrators. It would be impossible so we must come in now. The learned Judge should have adjourned the matter and seen whether the arbitrators would follow his ruling. The learned Judge has gone wrong in holding that the arbitrators decided nothing because they did decide that they had jurisdiction. We ask the Court to give directions to the arbitrators and tell them that all they can decide is the loss occasioned by the fire and by the water thrown on to extinguish the fire.

Inverarity :—Our first point is that the Court has no jurisdiction to entertain this petition on the ground that it does not comply with the requirements of the Arbitration Act and Rules of the High Court. There are nineteen policies and agreements and one award could not be made because the conditions are not the same. The conditions on the back of the policies must also be

(1) (1862) 32 L. J. Q. B. 55.

(2) (1887) 12 App. Cas. 738.

(3) (1879) 5 Q. B. D. 26.

(4) (1841) 1 Q. B. 102.

deemed to form part of the contract. That being so can nineteen Companies present one petition? It is not in accordance with the Rules of this High Court. The verification of the petition is wrong. The petition ought never to have been received. High Court Rule 863; section 51, Civil Procedure Code. This petition is not signed by any of the petitioners, it is not even signed by a person who holds a power of attorney. If we are right the Court has no jurisdiction to entertain the petition. This is all the more remarkable because other so called petitioners have dropped out. The appeal is brought by the Company with whom Mr. Croft, who signs and verifies the petition, has nothing whatever to do.

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[CHANDAVARKAR, J.:—Is this not a mere irregularity?]

Irregularity:—I submit not. As regards the second point, nineteen petitioners could not join in one petition there being nineteen different submissions. The body speaks of one submission and so does the prayer, which submission is the Court asked to revoke? It is said that clause 2 cures that defect, but it is not signed by all the Companies and again it is qualified. Take again the amounts of the policies, some are larger and some are smaller. Then we come to the merits of the case. What we meant by saying that the arbitrators decided nothing was that no right of the parties was decided. A “judgment” does not include a mere decision to admit or reject evidence. Mr. Strangman says he had a *right* to the order he asks for; nothing of the kind, it is a pure act of discretion. See Russell on Arbitration, 9th edition, page 125; *James v. James*.⁽¹⁾ Davar, J., has not expressed any opinion on any of the questions in the case. They are now asking the Court to do what the arbitrators had to do. The deed of reference does not mention loss by fire but loss according to contract. Our point is that this loss is covered by the policy even though it was not the direct result of the fire. “Consequential loss” is a very ambiguous term. Some losses are admittedly recoverable under the policy though they occur after the fire, *e.g.*, damage done by water, debris falling on the machinery. You cannot limit the loss to the action of the fire itself or in point of

(1) (1889) 23 Q. B. D. 12.

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time to the moment the fire is extinguished. If that is correct a great deal of damage done to the machinery is the direct result of the fire. You cannot touch the machinery till it is surveyed by the surveyors and now they want to shut us out from giving any evidence to show what time elapsed and who is responsible.

It is impossible to fix a date after which our evidence should be limited. The Insurers have to pay us the damage done to the property, there is no intervening cause. We say they were in possession till August 1907 at least, the fire having taken place in October 1906. Any damage done to the machinery must be deemed to be the direct result of the fire. An omission to do a thing which they might do is not an intervening cause. Supposing that there was a neglect of duty on the part of the Companies, how did that duty arise? Clearly under the contract of assurance, see clause 11 of the policy. Therefore it is within the terms of the policy. How can this Court decide now that all our contentions are incorrect? The arbitrators have made no mistake of law. We submit the case is on all fours with *Scott v. Van Sandau*⁽¹⁾. It being a matter of discretion is the Court going to interfere? The arbitrators should be asked to state what sums they would allow on different heads and then it is easy to set them right if they go beyond the scope of the reference. This application is practically to decide that for which the arbitrators have been appointed and therefore is unprecedented: see *In re Lord Gerard and London and North Western Railway Co*⁽²⁾, *The Irish Society v. Bishop of Derry*⁽³⁾, *The Carron Iron Co. v. MacLaren*⁽⁴⁾.

Strangman:—As to the verification of the petition I ask leave to have it done now. As to discretion see section 14 of the Arbitration Act: *Toolsce Money Dassce v. Suderi Dassce*.⁽⁵⁾

CHANDAVARKAR, J.:—Both the preliminary point and the point on the merits raised in this appeal turn upon the question whether the arbitrators have decided that the submission to them included the matter now in dispute between the parties. In other words, the question is—Have the arbitrators decided

⁽¹⁾ (1841) 1 Q. B. 102.

⁽²⁾ [1894] 2 Q. B. 215.

⁽³⁾ (1846) 12 Cl. & Fin. 641.

⁽⁴⁾ (1855) 5 H. L. C., p. 457.

⁽⁵⁾ (1899) 26 Cal. 361.

that they have jurisdiction to decide the matter as part of the terms of the reference to arbitration? Davar, J., has indeed held that they have decided nothing; but that is clearly wrong. The contention raised before the arbitrators by the respondent Ahmedbhoj Habibbhoj's solicitor, Mr. Hormusjee, was that the respondent was entitled to claim damages from the Insurance Companies for the loss suffered by him owing to deterioration of the machinery consequent upon the neglect of the Companies to take proper care of it after they had taken possession of it, and that this claim was part of the submission. The Insurance Companies denied that the claim in question formed part of the reference. The meaning of the decision of the arbitrators upon that preliminary question is, to my mind, plain. They substantially held that, whatever conclusion they might ultimately arrive at after hearing evidence on the claim, they had jurisdiction to take evidence and decide whether Ahmedbhoj was entitled to any, and if so what, damages for the specific loss alleged.

What the arbitrators have, then, finally decided is, that they have jurisdiction over the matter now in dispute; that it is competent for them to enter into the merits of the dispute after taking evidence and to adjudicate upon it.

Davar J.'s order virtually compels the Insurance Companies to submit to the jurisdiction of the arbitrators, whereas those Companies complain that, having regard to the terms of the reference, no such jurisdiction exists. The order decides a question of their right. They say that they have a common law right to have the dispute decided in the ordinary way—in a Court of law. Davar, J., decides that they have not, but that the arbitrators have jurisdiction to decide it. The order is, therefore, a judgment within the meaning of clause 15 of the Letters Patent.

Passing to the merits, Davar, J., seems to me to have failed to perceive the real question at issue. He thought what he had to deal with was a case in which the complaint was merely that the arbitrators were committing an error of law by admitting irrelevant evidence. But in reality the admission of evidence by the arbitrators was complained of by the Insurance Companies not as an independent ground for grievance but as the result of

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an unwarranted jurisdiction assumed by the arbitrators. It was not the admission of inadmissible evidence that was the grievance: but the taking cognizance of a dispute not within the terms of the reference was complained of. The question, therefore, was—were the arbitrators exceeding or have they exceeded their jurisdiction? The answer to that depends upon a proper construction of the terms of the reference.

In construing the agreement to refer to arbitration we ought to bear in mind one cardinal principle—*viz.*, that by a submission to arbitration a party deprives himself of the right accorded to him by common law to have the dispute to which the submission relates decided by a Court of Law. Therefore, it must clearly appear from the terms of the submission that with reference to any point arising the party has so deprived himself. Here the dispute referred related to damages or loss from *fire*, whereas the claim on which the arbitrators were asked to adjudicate and which they have held they have jurisdiction to decide, in addition to the loss or damage from fire, is the loss or damage consequent on the tortious conduct of the Insurance Companies after the fire had been extinguished. Mr. Inverarity has before us attempted to show that what his client wants to do before the arbitrators is to prove that this latter loss is in substance loss from fire. But that was not the case made before the arbitrators, and I do not think that the loss alleged can be included in loss from fire on any reasonable view of the case, because the deterioration of machinery from neglect on the part of the Insurance Companies to take care of it is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire in fire insurance cases and from perils of the sea in maritime insurance, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, that underwriters become responsible for the further mischief so incurred. See Pollock B. in *Montoya v. London Assurance Company* (1).

The question, whether before the arbitrators or before Davar, J., was by no means one of discretion. It was, in my opinion, one of excess of jurisdiction in the arbitrators.

(1) (1851) 6 Ex. 451 at p 438.

Mr. Inverarity has raised the point that the petition before Davar, J., ought to have been dismissed because it was not signed by all the nineteen petitioners, that this appeal is by but one of the Insurance Companies, and that the other Companies are not parties to it. This ground would have required serious consideration if we had to revoke the submission to arbitration; but as the order we have decided to pass is at present no more than an intimation to the arbitrators of our opinion on the question of their jurisdiction, it is immaterial whether all or some of the Insurance Companies are *formally* parties to the proceedings in this Court. As to the other objection that, even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to the signatory. And this irregularity does not affect the merits of the case.

The result is that the order of Davar, J., must be discharged with costs, in both his Court and this, on the respondent; and that the arbitrators should be informed that, in the opinion of this Court, their jurisdiction extends only to the dispute relating to loss or damage from fire under the terms of the policy in each case, and not to the question of any loss or damage alleged to have arisen from the neglect of the Insurance Companies to take care of the machinery after the fire had been extinguished and the Companies had entered upon possession under clause XI of the Policy.

BACHELOR, J.:—I concur: but as I am differing from my brother Davar I should like briefly to explain the reasons for my opinion.

The only question, it appears to me, is what have the arbitrators decided, if they have decided anything?

The learned Judge below was of opinion that they have decided nothing, and, therefore, he declined to interfere with their order. Now, their order is one of which it is not easy to be quite confident as to the meaning, but upon the best consideration that I can give to it, it seems to me to decide that the

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reference to the arbitration does include the question whether the plaintiff is entitled to damages on the ground that the Companies having gone into possession were guilty of negligence in not cleaning and not protecting the machinery. If that is the meaning of the order, then I think the appellants must succeed, for, as to the preliminary point that no appeal lies, that order on my interpretation is a judgment since it goes to jurisdiction by enlarging the scope of the arbitration submission and by depriving the appellants of their rights to have these matters decided by a suit: see *Hadjee Ismail Hadjee Hableeb v. Hadjee Mahomed Hadjee Joosub*.⁽¹⁾ And if the appeal is competent, then, I think, it ought to be successful; for the policy, the agreement to refer and the terms of the reference all satisfy me that no claims on account of negligence by the companies after they had, as alleged, gone into possession, were included in the submission. That I think was limited to the loss by fire (including of course the loss by water in extinguishing the fire) and it is plain that a claim on this footing must be limited somewhere and that it cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*.

Now here the plaintiff's case is that the Companies were in possession from October 1906 to August 1907 at least, and it seems to me impossible to hold the damages arising by reason of their negligence throughout this prolonged period are such damages as are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from a totally different origin, an origin which, it seems to me, is wholly distinct and separable from the fire, namely a neglect by the Companies of some duty imposed on them after the loss by fire or water had become an accomplished fact.

As to the technical objections which have been urged by Mr. Inverarity I am of opinion that they are all of a merely formal nature; that there is no substance in them; and that they ought not to be allowed to stand between us and the decision of this appeal on its merits.

(1) (1874) 13 Ben. L. R. 91.

For these reasons, I concur with my learned colleague as we are assured that the arbitrators will gladly give effect to any expression of opinion from us.

The appellants must have their costs.

Order reversed.

B. N. L.

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ARBITRATION
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ORIGINAL CIVIL.

Before Mr Justice Beaman.

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January 25.

*Jurisdiction—Practice—Presidency Small Cause Courts Act (XV of 1882), section 22—Suit cognisable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing *vaida* rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), section 93—Sale—Tender.*

The Bombay United Rice Merchants Association was a commercial body of which most of the principal rice merchants in Bombay were members. Its rules were printed and circulated and they prescribed a certain form of contract which was very generally used in Bombay. By these rules a Sub-Committee was nominated "to decide all disputes which may arise as to contracts and do all other business relating to contracts." It was also provided that the "exclusive authority" to decide all such disputes should be the said Sub-Committee and the Association and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and on the last day of the *vaida* should fix the *vaida* rate (i. e. the market rate of the day) on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association, but they employed agents in

* Suit No. 172 of 1907.

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Bombay, who were members, to purchase rice for them and on the 24th November 1906 these agents bought from the defendants 1,340 bags of rice at Rs. 9 per bag deliverable at the *vaida* of Magshir Sud 1963 (i.e. from the 18th November 1906 to 30th November 1906). The contract which was in the printed form framed under the rules as above mentioned contained the following clause:—"This contract is made subject to the rules of the Bombay United Rice Merchants Association. Each party is bound to act in accordance with the same." For delivery at this *vaida* a large number of the members of the Association had made contracts of sale. The plaintiffs and a few others were purchasers and they were apprehensive that in settling the *vaida* rate the interests of the buyers would be disregarded in favour of those of the sellers. They accordingly wrote to the President of the Association calling upon him to see that no interested person was allowed to act on the Sub-Committee for fixing the *vaida* rate. In accordance with the practice a general meeting of the Association was held on the 30th November 1906 at which after discussion a special Sub-Committee was appointed to fix the rate consisting only of three persons one of whom was not a member of the standing Sub-Committee and another of whom had large contracts of sale due at this *vaida*. This Sub-Committee fixed the rate at Rs. 8-11-0 per bag. The plaintiffs alleged that it should have been fixed at Rs. 9-2-0 or Rs. 9-4-0 per bag which was the real market rate of the day; that the rate fixed was dishonestly fixed in the interest of sellers; that the Sub-Committee was not constituted according to the rules, two members of it being ineligible, one because he did not belong to the standing Sub-Committee and the other because he was interested in fixing a low rate, and they contended that for these reasons (*inter alia*) they were not bound by the rate fixed. They had duly demanded delivery of the rice contracted for and the defendants failed to give delivery and the plaintiffs now sued for the difference between the contract price (Rs. 9) and the market price on the 30th November 1906. The sum claimed as damages was less than Rs. 1,000.

The defendants pleaded--

1. That having regard to section 15 of the Civil Procedure Code (Act XIV of 1882) and section 18 of the Presidency Small Cause Courts Act (XV of 1882) the suit was not maintainable in the High Court.

2. That certain alleged partners of the plaintiffs not being parties to the suit it should be dismissed for non-joinder.

3. That having regard to the rules of the Association which provided a remedy in case of disputes among its members and forbade their going to law, the plaintiffs were precluded from suing at law at all events until they had exhausted the remedies provided by the rules.

4. That the plaintiffs were bound by the *vaida* rate fixed by the Sub-Committee appointed by the Association.

Held, (1) That the High Court had jurisdiction and that the suit should proceed subject to the provisions as to costs contained in section 22 of the Presidency Small Cause Courts Act (XV of 1882).

(2) That the alleged partnership was proved, but nevertheless the suit could not be dismissed for non-joinder.

(3) That the plaintiffs were entitled to sue at law notwithstanding the provisions contained in the rules of the Association requiring all disputes to be submitted for decision to the Association and restricting the right of members to sue each other.

(4) That at the meeting of the Association held on the 30th November 1906 the plaintiffs (through their agents) had consented to the appointment of a Sub-Committee of three persons to fix the *vaida* rate and that they were therefore bound by the rate then fixed.

Any stipulation that the award of an arbitrator shall be accepted as final restricts the rights of contracting parties to invoke the aid of the ordinary Courts and to that extent is void.

The effect of section 28 of the Indian Contract Act (IX of 1872), section 21 of the Specific Relief Act (I of 1877), read with the related sections of the Indian Arbitration Act (IX of 1899) and of the Civil Procedure Code dealing with arbitration is that a person may not contract himself out of his right to have recourse to Courts of law but that in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts.

THE plaintiffs filed this suit to recover from the defendants the sum of Rs. 710-6-8 as damages for breach of contract in failing to deliver certain bags of Rangoon rice which the plaintiffs had contracted to buy and take delivery of by two contracts, the first of which was dated the 22nd October 1906 and made between the defendants' firm of Gangi Narsi and the plaintiffs' firm of Mulji Dharsi, and the second of which was dated the 24th November 1906 and made between the defendants' firm of Gangi Narsi and the firm of Ravji Narsang who were the agents of the plaintiffs in making the contract. The two contracts were made subject to the rules of the Bombay United Rice Merchants Association.

The defendants denied that the firm of Ravji Narsang were the agents of the plaintiffs in making the second contract so that the plaintiffs had any right of action in respect thereof and they submitted that inasmuch as the sum claimed by the

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plaintiffs as damages in respect of the first contract did not exceed Rs. 1,000 the High Court had no jurisdiction to try this suit. They further alleged that the firm of Khoorpal Dungeersey was a partner in the plaintiffs' firm of Mulji Dharsi and was therefore a necessary party to the suit.

Without prejudice to the above contentions the defendants also alleged that they were at all times ready and willing to deliver the said bags of rice to the plaintiffs, but that the plaintiffs never asked for delivery.

They denied that the plaintiffs had suffered any damage and they disputed the price of the rice on the due date.

The defendants further alleged that according to the rules of the Bombay United Rice Merchants Association subject to which the contracts in suit were made, the plaintiffs and defendants were bound by the rates fixed by the Association and that the rate so fixed for the *vaida* for which the said contracts were entered into was Rs. 8-11-0 per bag upon the footing of which the defendants had become entitled under the said rules to recover from the plaintiffs the sum of Rs. 481-9-0 in respect of the first contract referred to and the defendants counter-claimed accordingly. They further counter-claimed against the plaintiffs in respect of three contracts dated the 12th, 14th, 16th November 1906 under which the firm of Ravji Narsang purchased from the defendants for the same *vaida* 670, 1,340 and 1,340 bags of rice at the respective rates of Rs. 8-14-8, Rs. 9-0-2 and Rs. 8-15-11, and alleged that in respect of these three contracts and the second contract abovementioned they became entitled to recover from the firm of Ravji Narsang the sum of Rs. 1,351-14-0 by way of difference, no delivery having been taken by the said firm under any of the said contracts.

At the hearing the plaintiffs abandoned their claim on the first contract which amounted to Rs. 60.

Bahadurji (with him *Lowndes* and *Desai*) for the defendants :—

The firm of Khoorpal Dungeersey is a partner with the plaintiffs and should have been joined as a co-plaintiff. The suit should therefore be dismissed, See *Kalidas Kevaldas v. Nathu*

Bhagvan ⁽¹⁾; *Ramsebh v. Ramlall Koondoo* ⁽²⁾; *Motilal Bechardass v. Ghellabhai Harwan* ⁽³⁾; *Aga Falam Husan v. A. D. Sassoon* ⁽⁴⁾; *Akhsha Bibi v. Abdul Kader Sahib* ⁽⁵⁾.

The plaintiffs cannot sue in a Court of law according to the rules of the United Rice Merchants Association until the Association has given its decision. See Rules 11, 29, 41, 46; Leake on Contract (5th edition), p. 675; *Scott v. Avery* ⁽⁶⁾; *Spinnier v. La Cloche* ⁽⁷⁾; *Trainor v. Phoenix Fire Assurance Co.* ⁽⁸⁾.

The plaintiffs never asked for delivery, they only demanded a delivery order. *Mulji Govindji v. Nathubhai Hirachand* ⁽⁹⁾.

Indian Contract Act (IX of 1872), section 93, Benjamin on Sales (5th edition), p. 595.

The plaintiffs are bound to accept the *vaida* rate fixed by the Association, this rate leaves a balance in favour of the defendants which we ask for in our counter-claim.

Kirkpatrick (*Inverarity* and *Jinnah* with him) for the plaintiffs:—

The onus of proving that Khoorpal Dungersey is a partner is on the defendants.

Even if proved the suit should not be dismissed. See Civil Procedure Code, Order I, Rule 9; *Mahabala Bhatta v. Kunhanna Bhatta* ⁽¹⁰⁾.

The cases cited by the other side do not apply. They were dismissed because at the date at which a necessary party was added they were barred by limitation.

The plaintiffs are entitled to bring this suit. That point was decided when the summons taken out by the defendants to stay these proceedings under section 19 of the Arbitration Act, was dismissed. The defendants did not appeal against that decision. We rely on the Indian Contract Act (IX of 1872), section 28;

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(1) (1883) 7 Bom. 217.

(2) (1881) 6 Cal. 815.

(3) (1892) 17 Bom. 6

(4) (1897) 21 Bom. 412.

(5) (1901) 25 Mal. 26.

(6) (1856) 5 H. L. C 811.

(7) [1902] A. C. 446.

(8) (1892) 65 L. T. 825.

(9) (1890) 15 Bom. 1.

(10) (1898) 21 Mad. 273 at p. 383.



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Specific Relief Act (I of 1877), section 21; Arbitration Act (IX of 1899), section 19; *Koonud Chunder Dass v. Chunder Kant*⁽¹⁾; *Crisp v. Adlard*⁽²⁾.

The following rules of the Rice Merchants Association were mainly referred to in the argument as well as in the judgment:—

Rule 14.—All kinds of disputes relating to *raidana soudas* (transactions) shall be decided only in the manner mentioned in these rules. And the exclusive authority to decide such disputes shall rest with the Committee and the Association only. And it is on this express condition that contract forms are supplied and every person signing such forms shall be taken to have knowledge of this express condition and to consent to and abide by all these rules. The Sub-Committee and the Association shall decide the matters placed before them as they think proper and each party to the contract shall be at liberty to go to Court in connection with the aforesaid transaction only for the purpose of enforcing the decision that is given in accordance with these rules. If any party does not respect such decision then whatever order the Sub-Committee or the Association shall make against him he shall have to submit to and if he does not submit his name shall be struck off from the records of this Association.

Rule 29.—For transacting all the above-mentioned business relating to *raidana soudas* (transactions) this Sub-Committee shall meet daily in the rooms of the Association from 3 to 5 o'clock. It shall keep a note of the daily *raidana* rates and if the purchaser refuses to take the goods appertaining to a contract or if the vendor fails to give delivery of the goods sold or fails to give delivery in accordance with the terms of the contract or if any party to the contract commits any default whatever then as to any damages on account thereof which the Sub-Committee shall fix and award or any other kind of order which it may make each party shall have to abide by the same and as to any decision which the Sub-Committee or the Association will give in any matter relating to a contract each party to the contract shall be regarded as bound by the same.

Rule 30.—On the due date, that is on the last date mentioned in the contract, this Sub-Committee will settle the rate of that *raidana*. Even if that rate be less or higher than the rate of that day yet each of the parties to the contract shall consider himself bound by the said rate so fixed. And in accordance therewith each party shall have to finish receiving or making payments on account of his profit or loss within twenty-four hours after the due date. And if the contract goods shall have been sold legally then each party shall have to regard the difference between the rates realised by the sale and the contract rate as profit or loss and shall have to receive or make payments thereof immediately after the goods are sold. And in receiving or making such payments if any party to the contract make any default then whatever order the Sub-Committee will make he shall have to abide by.

Rule 31.—On any three gentlemen of the above Sub-Committee meeting at the Association rooms they can transact all the business of the Sub-Committee but with-

(1) (1879) 5 Cal. 498,

(2) (1896) 23 Cal. 956,

out the sanction of the President or Vice-President and Secretary they shall not be able to give any decision and a decision given without such sanction shall be considered null and void.

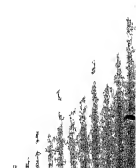
Rule 35.—If there be any disputes or business relating to *mandana soukas* (transactions) which have connection with any member or members of this Sub Committee or in which he or they are in any way concerned or interested then the decisions thereof or any business whatever in connection therewith shall not be given or done until other independent appointments are made in place of such member or members. But on such occasions arising this Sub Committee shall at once call a meeting of the Managing Committee of the Association and from out of them shall get the necessary number of independent gentlemen appointed in the places aforesaid and after that the new Committee formed as aforesaid including these new gentlemen shall transact in accordance with what is written above all business relating to the aforesaid disputes and their decisions shall be regarded as the decisions of the Sub-Committee and such decisions shall be regarded as having been given in pursuance of these rules.

Rule 37.—All powers to make changes (and) alterations in the appointments of the gentlemen appointed on the Sub-Committee and to fill up their vacancies and also to make alterations or amendments (or) additions in (or to) these rules, rest with the "Rice Merchants Association."

Rule 46.—Of these rules, if any rule be found defective or uncertain in meaning or should it happen that on any occasion the Sub-Committee is unable to do its work or is unable to do its work in a satisfactory manner in conformity with these rules, then on all such occasions as a last resource, a meeting of the Association shall be called and whatever decision may be passed thereat with regard to such matters, all persons concerned shall be bound thereby. But in connection with the contracts made in pursuance of these rules or in connection with any kind of business relating thereto no party to a contract shall be at liberty to go to Court in any way with regard to the said contract so long as he may be able to get all kinds of lawful decisions from the Sub-Committee or the Association, in other words, it is to be understood that every person entering into contracts in accordance with what is written above appoints by these rules, the Sub-Committee and the Association as arbitrator and final umpire and as to the decision which will be given in accordance with these rules the same shall be regarded as the arbitrators' award. Such being the case, every person entering into a contract shall have to go before the Sub-Committee or the Association for getting any matter relating to the contract decided and if he may not have been able to enforce the decision given by them in accordance with these rules then in that case he can go to Court only to enforce such decision and it shall be considered that every party to the contract and every party concerned therewith agrees with the rule made to this effect.

BEAMAN, J.:—The first point requiring decision is whether the firm of Khoorpal Dungersey is a necessary party to the suit? The answer to that question plainly depends upon the determination of a further question of fact, whether the firm of

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Khoorpal Dungersey is a partner of the plaintiff? That is a matter which must have been in the plaintiff's knowledge. Both he and Khoorpal Dungersey know and knew throughout the suit whether a partnership existed between them.

The defendant contends that the result of finding that Khoorpal Dungersey is plaintiff's partner must be the dismissal of the suit. To this the answer is that Rule 9, Order I of the Civil Procedure Code, forbids any suit to be defeated for misjoinder or non-joinder. Under the old Civil Procedure Code, section 31, it was enacted that no suit should be defeated for misjoinder. But as in England where the Rule of the Supreme Court first stood in the same language, the Courts inclined to include non-joinder. Yet there is more than one obvious difference both in the nature and the results flowing from the two defects, misjoinder, and non-joinder. Misjoinder can do the defendant no real harm, and remedying the mistake at any time, could not, as far as I can see, prejudicially affect in any particular, the course of the defence or attack. But non-joinder is altogether a different thing. Withholding a plaintiff and making him a witness, which is what the defendant alleges has been done in this case, might give the plaintiff an unfair advantage throughout the trial. Many questions which might be put to a plaintiff could not be put to a witness; and the whole effect of statements made by an interested party, must be, when the Court comes to weigh and appreciate the evidence tested and judged by other standards than those which would apply to the same statements made by a disinterested witness. If then a plaintiff has designedly, with the object of strengthening his case and evading awkward questions kept back a co-plaintiff, by a denial of facts which if proved would have entitled his opponent to insist upon having that person added at once as a co-plaintiff; and has thus throughout the trial secured exactly the advantages he had in view; it does seem that merely adding that person as a co-plaintiff or a co-defendant formally at the time of judgment is, from the defendant's point of view, no remedy at all of the wrong which has been done. Taking a case like this, if the Court finds when the trial is over, upon a painstaking analysis of much evidence and long consideration of many arguments,

that the fact which the plaintiff denied, is proved against him; that the man he said was not, really was his partner; then considering that if the fact had been admitted, that person must have been and would have been made a co-plaintiff or co-defendant from the beginning, it is a serious question whether the plaintiff should be allowed to turn round and say, well, it does not matter now; the Court may if it pleases add the man. For that amounts to this, that the plaintiff is permitted to make the fullest use of deliberate perjury; is allowed to lead evidence, as of a certain quality, while it really is not of that quality; is enabled to evade many questions that might otherwise have been put: to escape the effect of what might have turned out damaging admissions, all with complete impunity.

The cases cited under the old law, while they appear to recognise the defendant's right to have partners joined in the suit, are distinguishable, in this respect, that the suits were dismissed because by the time that the Court had found on the facts that other persons were partners and were necessary parties, the claim had against them become time-barred. *Kalidas Keraldas v. Nathu Bhagran*⁽¹⁾ and *Ramsebul v. Ramlall Koondoo*⁽²⁾. The principle I have in mind is essentially the same, resting on it the right as a right of the defendant to have partners made parties to any partnership suit brought against him; but its application, in the way I have suggested above, would go further, and on a divergent line, from the authorities on which defendant relied. Nor do I see any way of getting over the plain language of the Code.

Defendant has contended that this is not a matter of procedure, and therefore that the decision ought to be given under the old Code. He relies on section 45 of the Contract Act. But waiving the first part of that argument, it appears that while the English Rule was so worded as only directly to cover cases of misjoinder it was in practice extended to cases of non-joinder; and presumably the Courts in India would follow the English Judges. Nor am I able to accede to the argument that this is a matter of substantive right rather than procedure.

(1) (1883) 7 Bom. 217.

(2) (1881) 6 Cal. 815.

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Certainly it is the defendant's right, if he can show that a person is plaintiff's partner to have that person made a party to the suit; but it is matter of procedure how that person is to be made a party, and also what the effect of his not having originally been made a party is to have on the course of the suit. All this is specifically provided for in O. I, r. 10. True, the words of that rule appear to contemplate cases where the misjoinder or non-joinder are attributable to *bond fide* mistakes, whereas here there can be no question of a *bond fide* or any other mistake at all. Still the fact remains that the law says that no suit shall be defeated for non-joinder, and as non-joinder is all that the defendant alleges, I do not see how he can succeed in his further contention that if it is proved, the Court must dismiss the suit. I should be only too glad to take that view if I felt able to do so. But as I am quite unable to read any such qualification as would be needful to validate the defendant's plea, into the words of the law, it follows that even, should I on the question of fact find against the plaintiff. I could not for that reason dismiss the suit. And merely adding Khoorpal Dungeersey as plaintiff or defendant would not, as far as I can see help the defendant now in any way, or assist the Court in more thoroughly and satisfactorily disposing of what is in issue between the parties. So far as the defendants might stand in need of protection against another suit in respect of this claim by Khoorpal Dungeersey, it is sufficient to note that that firm has on oath denied that it has any interest in this contract, so that it would not be in a position afterwards to advance any claim upon it.

Thus it becomes of comparatively little importance to decide now whether Khoorpal Dungeersey is or is not the plaintiff's partner. But as a great deal of evidence has been led on the point and a good deal of argument addressed to it, as in various ways it has run through the whole case, colouring many parts of it, I think it as well briefly to resume the evidence, and state my conclusion upon it. [His Lordship then discussed the evidence upon the question of partnership and continued.]

I hold that there was a non-joinder, and that Khoorpal Dungeersey ought to have been a party plaintiff. But I do not

think in view of what I said in beginning to deal with this preliminary point, and upon a careful consideration of the scope and intent of O. I. r. 10, that I need not make any order adding Khoorpil Dungersey as plaintiff or defendant or that on account of the non-joinder I can dismiss the suit. I must proceed to dispose of it as it stands, limiting myself to the parties already on the array and the matters in issue between them.

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The next point which is likewise of a preliminary nature arises on issue 11. Shortly it comes to this, whether the plaintiff is precluded from coming into Court until he has exhausted the remedies provided for any member of the Association dissatisfied with a decision of the Sub-Committee? It might be put in other ways but that is the real meaning of it; and I may observe that it has been much blurred in argument by a failure to keep it wholly distinct from one or two other cognate questions which will need to be separately dealt with and answered. The rules, as I understand them, provide that the Sub-Committee shall fix the *valida* rate. That is one thing. Next, that all disputes arising between members of the Association shall be referred to the Sub-Committee. That is another thing. Then further, that no member of the Association shall go to law about any such dispute until he has obtained the final decision of the Association and then only to the extent of enforcing that decision. That is still another thing, and the thing with which I am at present concerned. I do not think that the point presents any difficulty. The statute law on this subject is contained in section 25 of the Contract Act, and section 21 of the Specific Relief Act. The effect of those sections read with the related sections in the Indian Arbitration Act, and in the Code of Civil Procedure dealing with arbitration, is that a person may not contract himself out of his right to have recourse to Courts of law; but that in the event of any party having made a lawful agreement to refer the matter in difference to arbitration, as a condition precedent to going to law about it, the Courts will recognize the agreement and give effect to it by staying proceedings in the Courts. The principles underlying this branch of the law have I think long been clearly settled. The series of decisions starting with *Scott v. Avery*⁽¹⁾ lay down the rule to

(1) (1856) 5 H. L. C. 811.

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which statutory enactment has been given in section 28 of the Contract Act. And the question is whether the defendants' contention, if found to be correct, brings this case within the rule.

First, it is to be observed that the contract in suit was made on a printed form supplied by the Association. That form sets forth the terms and conditions upon and under which the contract is made. It has been argued for the plaintiff more than once that he is not a member of the Association, and it is therefore suggested, I would say, rather than contended, that in working out his liabilities under the contract form, he is entitled to be treated with more liberality than a member of the Association. I do not think that that need be seriously considered. The contract was made for him by an agent who is a member of the Association, with another person who is also a member of the Association. The plaintiff was an undisclosed principal. The defendant knew nothing about him; he made his contract with a member of the Association, on an Association form, binding both parties to the contract to abide by the rules of the Association. It cannot be, and I do not think it has been directly contended that the plaintiff is not as much bound as his agent would have been bound had he been in reality, what he appeared to be, *viz.*, a principal. This is not an isolated dealing; the plaintiff in employing Ravji Narsang knew quite well what sort of contracts he was empowering him to make; and what he did, what the agent did I mean, in the exercise of his delegated power, appears to have been entirely within the scope of his ordinary and legitimate authority as plaintiff's agent. Moreover for one part at least of his case the plaintiff himself strongly relies upon a rule of the Association imported by reference into this contract. It does not therefore lie in his mouth to repudiate other rules similarly imported.

Exhibit A is the contract in suit; it contains these words:—

"This contract is made subject to the rules framed by the Bombay United Rice Merchants Association. Each party is bound to act in accordance with the same." "All other conditions relating to the *kabala*, are in accordance with the aforesaid rules. Each party admits that he is fully aware of the same."

Rule 14 says :—

“All kinds of disputes relating to *wardana soudas* shall be decided only in the manner mentioned in these rules, and the exclusive authority in all respects to decide such disputes, shall according to these rules rest with the Sub-Committee and the Association. . . The Sub Committee and the Association as mentioned in these rules bring an end to or decide the matters placed before them, as they may think proper and each party to the *kabala* shall be deemed as bound to accept the same as final decision.’

Now I may observe on that at once that it goes beyond the principle. It does amount to excluding the jurisdiction of the Courts altogether : see *Coringa Oil Company, Limited v. Koegler* ⁽¹⁾. Any stipulation that the award of an arbitrator shall be accepted as final does restrict the rights of the contracting parties to invoke the aid of the ordinary Courts, and to that extent appears to me to be void : see *Rangu v. Sithiya* ⁽²⁾.

Then the rule goes on—

“And any party to the *kabalas* shall be at liberty to go to a Court in connection with the aforesaid *soudas*, only for the purpose of enforcing the decision that is given in accordance with what is written in these rules.”

That again appears to me to go a long way beyond the principle.

The rule concludes with a penal clause providing that if any member does not abide by what has been quoted his name shall be struck off from the Association. That, I think, is within its powers, but it is not a matter into which I have now to inquire.

Then comes rule 46 which is of a very sweeping character. First, it vests a general meeting of the Association in the last resort with plenary powers to supply all deficiencies in the rules themselves and all disabilities on the part of the Sub-Committee. And it says that all persons concerned shall be bound by whatever decision may be arrived at by that body in regard to such matters. It continues—

“But in connection with the *kabalas* made in pursuance of these rules, or in connection with any kind of business relating thereto no party to a *kabala* shall be at liberty to go to Court in any way with regard to the said *kabalas*

(1) (1876) 1 Cal. 466.

(2) (1883) 6 Mad. 368.

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so long as he may be able to get all kinds of lawful decisions from the Sub-Committee or the Rice Merchants Association. In other words, it is to be understood that every person or persons entering into the *Labalas* in accordance with what is written above appoints by these rules the Sub-Committee and the Association as its arbitrators and final umpire, and as to the decision which will be given in accordance with what is written in these rules, the same shall be regarded as the arbitrator's award."

I pause to remark the ambiguity of such words as "all sorts of lawful decisions." That of course leaves a very wide door open. Any one may say, as the plaintiff now says, that he could not obtain any sort, let alone all sorts, of lawful decision out of the Sub-Committee or the general assembly of the Association.

The rule goes on—

"Such being the case every person entering into a *Labala* shall have to go before the Sub-Committee or to the Association for getting any matter relating to the *Labala* decided; and if he may not have been able to enforce the decision given by them in accordance with these rules, then in that case, he can go to Court only for enforcing such decision."

That is the rule upon which the defendant chiefly relies. It is of peculiar importance as constituting the Sub-Committee arbitrators, and the Association the final umpire of all matters in disputes over *vaida soudas*. And the question of course is whether to that extent it is not quite a lawful agreement which the Courts would enforce. So much of it as compels members to accept any decision as final, I have already said, is in my opinion unlawful, and would not be recognized to the extent of shutting any member of the Association out of the regular Courts.

Now although the plaintiff did not submit his grievance in person to the general assembly of the Association, he lost no time in protesting against the rate fixed at the meeting of the 30th November 1903, and as a matter of fact a general meeting was called, and all that is in contemplation in Rule 46 seems to have been done. It is true that the plaintiff was not present. But that was his own choice. He refused to attend any more meetings of the Association after the 30th November, because what had happened there had, he says, convinced him that he could not hope for fair treatment. But he sent in lawyer's letters, and therefore made it plain that he had a grievance of the

kind contemplated. Then the Association called a meeting and we must suppose that all that the plaintiff had advanced in his letters was duly considered, with the result that the proceedings of the meeting of the 30th November and the rate fixed at it were confirmed. So that really the only question open is whether the plaintiff can come into Court to question the finality of that decision. I am quite clear that he can. To hold otherwise would put a practically unlimited power in the hands of men who, judging from what I have seen of them in this case, are certainly not fit to be entrusted with it. Suppose that when the rate had been fixed on the 30th November the plaintiff had immediately filed a suit; then it would have been open to the defendants to move the Court under section 19 of the Indian Arbitration Act to stay proceedings till such submission as is contemplated in Rule 46 had been duly made; and the Court would then have considered whether this was the proper course. In fact this was actually done by the defendants although as far as I can see all that the rules required had been done, and all arbitration proceedings properly or improperly so called under the rules of the Association, had ended. That application was heard by my learned brother Davar in chambers. It was apparently argued at length, and Davar, J., refused to stay this suit under section 19 of the Indian Arbitration Act. In those circumstances especially having regard to the fact that the general body of the Association did meet and decide the points upon which the plaintiff now craves the judgment of the Court, the question narrows down to this, is the plaintiff shut out by any term of his contract from coming into Court and challenging the finality of the decision made against him by the Rice Merchants Association? If he is, then he is most certainly deprived of his ordinary common law right. For there is no decision in his favour, which he could, according to the rules, come into Court to enforce. So that his position would be this. He had a serious controversy with members of the body, involving charges of partiality and misconduct but he is wholly precluded from agitating those matters in a Court of law in the terms of the rules to which he is a subscribing member. The absurdity of this contention is that it shuts every dissatisfied

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party out of Court. It is only those in whose favour the assembly of the Association has pronounced that may go to Court to enforce that decision. Those against whom it has decided have no remedy. That I think is a proposition which needs only to be stated to carry on its face its own refutation. Doubtless the Association may expel, if so advised, any of its members who break this rule and insist upon bringing their grievances to trial in a Court of law.

But assuming for the purposes of this discussion that the procedure provided for the settlement of disputes by the rules of the Association is really procedure by arbitration, then at most it might be contended that until any dissatisfied member had tried his chances in the way provided by the rules he could not be heard in a Court of law. And that brings us back to this point, that if there is anything at all in this contention it is exactly what would be material in any contention of the same kind advanced under section 19 of the Indian Arbitration Act. And that again is always preliminary, and is to be decided *in limine*, as it was decided in this suit. Supposing that Davar, J., decided it wrongly, and I should be very slow to think that he did, what is the result? Only what might always happen, *viz.*, that a reference to arbitration had proved abortive. Courts are not infallible, and as long as they have to decide in each case brought before them whether a suit ought or ought not to be stayed for the reason given now by the defendant there is always an equal chance that it will not be stayed. To go beyond that and, at the close of the trial, to contend that the plaintiff cannot have the benefit of the litigation at all (if he should prove successful), because a reference to arbitration was not carried out in whole or in part, seems to me an extremely strange proposition. Indeed, I do not really know how the defendant would work it out. If the Court were to hold that Rule 46 required reference of the particular matters now in suit to the arbitration of the Sub-Committee and after them to a general meeting of the Association, does the defendant say that the Court should dismiss the suit and remit the plaintiff to where he stood in December 1906? What would be the result of that? Only that the plaintiff would have to go through the

form (if he could get anyone now to listen to him) of appealing to the Sub-Committee and again to a general meeting to rescind all the resolutions and acts done and passed in November and December 1906, failing which I presume he would have to re-open this suit and pursue his remedy once more through exactly the same tedious and expensive litigation. If the defendant was dissatisfied with Davar J.'s chamber order why did he not then appeal? I am not aware of any law or principle which could be vouched for the extraordinary proposition that a suit which has after a long hearing come to an end should be stayed for the purpose of sending one of the parties back to an already pre-judged arbitration. I must therefore overrule that objection and find upon the eleventh issue, that the plaintiff can have the judgment of the Court on the matter put in issue before it, notwithstanding anything in Rules 14 and 46 of the Rice Merchants Association to the contrary.

Seemingly connected with and referable to the same principles as the question just dealt with is another, namely, whether the plaintiff in this suit is bound by the rate fixed by the Sub-Committee or its delegates at the meeting of the 30th November 1906. Whether the fixing of the *vidua* rate, under Rule 30 of the Association, is, when all the rules are read together, to be regarded as the award of arbitrators, the result of a reference to arbitration, or only so by a loose analogy, it is plain that this is an altogether different question from that which disputes the plaintiff's right under the rules to come into Court at all. For assuming that this is an arbitration award, it has been given. It is finished; the arbitrators are *functi officio*. And the plaintiff, as far as that award is concerned, and that only, has undoubtedly the right to come to Court and challenge it on the ground that the arbitration itself was improperly procured, or that the arbitrators were partial or were guilty of misconduct. It is only when we read Rule 14 with Rule 46 that the preliminary question takes definite form.

It may very well be doubted whether when we read Rules 14, 37 and 46 together, the Association meant to leave anything open for subsequent challenge or dispute touching the rate

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fixed under Rule 30. All the disputes which are contemplated seem to be disputes between member and member about *vaida* and other contracts, not a dispute about the correctness of the rate decided upon to be the standard of settlement. In that connection it is important to pay careful attention to the wording of Rule 30. The rule says nothing about "impartial" persons. It only says that the Sub-Committee shall fix the rate; and all members of the Association shall be bound by that rate; and shall pay or receive differences on the basis of it, and that should any member make default in settling on the said basis, he shall be subject to any orders which the Sub-Committee may make in that matter. Now it looks as though the concluding clause contemplated possible disputes to arise after the rate has been fixed, and Rule 37 provides *inter alia*, as I understand it, for the settlement of such disputes. Then no doubt it would be necessary that the persons entrusted with making the settlement should not be the parties to the dispute, and should in that sense be impartial. But considering the nature of the Association and its composition, it might very well be that no *quorum* of "impartial" men, in the sense of men having no contracts for the *vaida*, could be found; and so I suppose the Association would not insist upon that special qualification. And as a matter of fact when we look into what has been done it is clear that the Sub-Committee has comprised men who had *vaida* contracts. If, as the plaintiff now contends, it should have consisted of at least ten or eleven members, it is obvious that it might frequently have been impossible to find so many or anything like so many out of a body of, say, forty or fifty, all rice dealers who had no forward contracts. So that while no doubt, under the general language I have already quoted from Rule 46, all these proceedings are declared to partake of the nature of arbitration proceedings, the only proceedings which might be thought to bear a close analogy to, and be governed by the principles applicable to what the law understands by arbitration, are those which would be called for when a dispute had arisen *after* the fixing of the *vaida* rate, between members of the Association upon *other points* of settlement. And it is only when a member has failed to have recourse to those proceedings

before coming into Court that the preliminary objection could properly be taken, and then, it appears to me, only in a particular way, by motion to stay the suit till the agreement to submit to arbitration had been fulfilled.

That is of course an entirely different thing from the contention I now have to examine, that the plaintiff is bound by the *vaida* rate fixed on the 30th November 1906. For rightly or wrongly that was fixed. If the plaintiff be held to have agreed to submit that question to arbitration, *volens volens* he has submitted it to arbitration. He says he did not want to ; that he was dissatisfied with the arbitrators, and still more dissatisfied with their award ; but at any rate the award was made. The resultant question is the common question whether or not the plaintiff is entitled to have that award set aside as far as he is concerned on the grounds of misconduct partiality. and so forth. And as to that of course there can be no preliminary bar at all. So that we must keep it distinct from the former question, which is of a preliminary kind, and if answered in the defendant's favour, would result in the suit being stayed, and the parties remitted to the contemplated arbitration.

Now though by analogy, and really too in the last analysis, this fixing of the *vaida* rate was an act of arbitration (for what else could it be ?), looking to the scope and character of all the rules together it can hardly be treated from the same legal standpoint as quite normal arbitrations. The first principles of ordinary arbitration require that the parties should be heard before the arbitrators, and that the arbitrators should be impartial (I speak now quite generally). But under Rule 30 it is plain that no hearing was contemplated or ever in fact took place since the founding of the Association. Nor, as I have already pointed out, is it likely that in view of the restricted field from which the arbitrating body had to be chosen, impartiality in the strict sense was made, or was ever intended to be made, an indispensable qualification. In the history of the Association there can be no doubt that before the 30th November 1906 many members who had *vaida* contracts sat on the Sub-Committee appointed to fix the *vaida* rate. And it would appear

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from the tenor of the plaintiff's concluding arguments that he does admit that under the terms of his contract he would have been bound by a rate fixed in accordance with the rules. Practically no doubt he would, though for the sake of consistency I must again point out that any contract, not only to refer to arbitration, but to accept the award as absolutely final, goes beyond the true principle. That is to say, even if the rate had been fixed strictly according to the rules, I doubt whether any member who was dissatisfied might not come to Court and try to get the rate set aside on such grounds as fraud or misconduct. I say the practical result would be much the same as though no such course were open to him, because, if all the rules had been followed it is hard to believe that any Court would interfere in favour of a dissatisfied member. But I do not doubt at all that the Court would have the power to do so for sufficient reason.

And in this connection I may take up an argument which properly belongs to the consideration of the preliminary objection, namely, that even if the rules are rightly construed to mean that it is only for the settlement of other disputes, not for the settlement of disputes about the actual fixing of the *vaida* rate, that a scheme of arbitrators was framed, still where in fixing the rate under Rule 30 there has been such a wide departure from what the rules enjoined as to make the whole of that proceeding invalid, a dissatisfied member would be absolved by that initial illegality from all further duty of obedience to the rest of the rules. If, however, I am right in keeping these two matters separate, I do not think that it would necessarily follow that a member of the Association who was dissatisfied with the manner in which the rate was fixed would necessarily be at liberty to ignore all other provisions in the Rules, sending him before other bodies of the Association for redress, and come at once into Court. The fixing of this *vaida* rate is a matter in which presumably all or a majority of the Association would always be interested, and in respect of which there would be a recurring dispute (potential at any rate) between those to whose interest it was to have a high, and those to whose interest it was to have a low, rate fixed. And therefore the absoluteness with which the rule lays down the procedure, as well as the

manner in which it compels obedience in the immediate results of the procedure, seems to me to indicate that when the Association framed their rules, they intentionally put the fixing of the *vaidi* rate on a different footing from ordinary accidental personal disputes and did not contemplate any exception being taken to it. That view, however, I must admit is weakened by what has happened in the present case, for after the plaintiff's party had seceded and sent in lawyer's letters, it appears that the Association did reconsider the question and (in the absence of the plaintiff who refused to attend) reaffirmed the *vaidi* rate.

But the really important question which arises as soon as we have more or less successfully cleared the way to it through the intricacies of these Rules, seems to be whether in the particular instance any member of the Association is bound by the *vaidi* rate fixed on the 30th November 1906? The plaintiff says no, for the following among other reasons:—

1. That the whole proceeding went on in violation of the rules.

2. That one at least of those who served on the Sub-Committee to fix this *vaidi* rate was not a member of the Sub-Committee at all.

I admit, says the plaintiff, that I was bound to accept the rate fixed for the *vaidi*, in accordance with the rules but I was not bound because I never contracted to accept a rate which was fixed, not according to the rules, but in a manner which certainly I had never contemplated, and did not assent to. And it was added that what happened at the meeting when looked at in the light of this contention was immaterial, the point being not whether protests were or were not made, but the fact that the rules did not authorize what was done.

There is however a way of looking at this question which would, or at least might, make the plaintiff's conduct at the meeting material. For, if although owing to differences of opinion the original intention of appointing a committee of twelve in accordance with the rules could not be carried out, yet the plaintiff and all others present did consent to a substitution of another

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tribunal for the tribunal provided by the rules, then to that extent it might be reasonably contended that they made Ransi Devraj, Amarchand and Morarji their arbitrators for the purpose of fixing the rate, and would in consequence be bound by the award given, unless it could be shown that it was procured in such a way that a Court of Justice would set it aside for that or some other sufficient reason inhering in the composition or conduct of the arbitrating body.

Now let me look a little more closely into the materials upon which the rival contentions are based. When the Association was founded, or at any rate when the rules were drawn up, in March 1902, rule 2 appointed the Sub-Committee. It consisted of four *ex officio* and eight appointed members. The rule does not say that the Committee shall consist of twelve persons. It merely names twelve persons, and constitutes them to be the first Sub-Committee. But it does appear to mean that four at least (the *ex officio* members) shall *always* be members of the Sub-Committee, and the implication of course is that the total number would exceed four. On the other hand, I do not find anything to lend colour to the contention that twelve was the minimum number or that there was (unless we take the four *ex officio* members to be an irreducible minimum) any minimum number. And looking to the course of business in the Association and what we know has been done and passed unquestioned, I doubt whether there is as much force as the plaintiff thinks in his argument that the Sub-Committee of November 30th was incompetent because it consisted of only three members. All sorts of business is entrusted to this Sub-Committee, which is no doubt a standing Sub-Committee. And rule 30 certainly says, this Sub-Committee shall fix the *vaida* rate. But I am not prepared to go the length of saying that that means necessarily the whole of this Sub-Committee. We must remember that the rules are very loosely, often very badly, worded. They appear to have been drafted by the Rice Merchants themselves without legal assistance. And I look upon them as intended to give a general, rather than an absolutely and rigidly accurate description, of the manner in which the internal business of this Association was to be conducted, and

its disputes were to be composed. Some elasticity of construction ought I think to be permitted. And it is shown that on one previous occasion at any rate the *vaida* rate was fixed by four members only. No exception appears to have been taken by anyone to that departure from the ordinary procedure. The ordinary procedure, I may add, appears to have been to nominate some twenty members or so and then to select twelve from them at the meeting called to fix the *vaida*. Now that again shows how difficult it is to keep to any literal interpretation of the rules. For as far as this record goes, unless I am mistaken, the Court has not been told that the number of the Sub-Committee was so much enlarged as to make the naming of twenty persons, all members of it, possible. And yet naming others who were not members of the Sub Committee as eligible for selection to fix the *vaida* seems to imply that the literal application of Rule 30 had ceased to be insisted on. If in that important particular, a particular be it noted on which the plaintiff much relies when he objects to the inclusion of Morarji in this Sub-Committee, then why not in other particulars which are not even prescribed *totidem verbis* by the rules, such as the minimum number, and so forth.

However that may be, the material facts are that the Association, as all such Associations naturally would, includes buyers and sellers, or as we may call them for convenience Bulls and Bears. The Bulls want a high rate fixed; the Bears want a low rate fixed. And underlying all this is of course a suspicion, to put it no higher, that a considerable number at any rate of these so-called *vaida* contracts are purely speculative, even gambling. The Bulls mean to force a high rate and so profit by the differences; in the same way the Bears want to force a low rate and in their turn make their profit out of differences. In such contracts it may very well be doubted whether the parties have in contemplation anything more than the differences upon their speculative dealings which will be determined by the *vaida* rate. Plaintiff was a Bull and the defendant was a Bear for this *vaida*. A few days before due date, plaintiff seems to have got wind, or suspected an intention on the part of the Bears to force an unfairly low rate on the Association. Theore-

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tically of course the due date rate should correspond with the actual market rate. Rule 30 provides that the mere fact that it does not exactly correspond with the market rate, is not to be a ground of objection. But it clearly means no more than that the Sub-Committee is not infallible, and indicates that the object in view is to fix a fair market rate of the day. It appears from the accounts which the plaintiff and his witness give of the meeting that the Bears were in the majority. And there were rumours flying about a day or two previous that an unfairly low rate would be fixed. On the 21th a preliminary meeting had been summoned at which twenty names had been put forward, and according to the summons the meeting of the 30th was to select from them twelve to form the Sub-Committee to fix the *vaída*. Alarmed at what was going forward the Bulls went to their Solicitors and got letters written to the Association protesting against any unfairly low rate being fixed. These letters were read at the meeting of the 30th and gave rise to all the trouble which has followed. Instead of proceeding at once to business and choosing twelve men to serve on the Sub-Committee, Morarji appears to have asked the plaintiff (when I say the plaintiff I mean of course his representative) what his objection stated in the letters really was. To this the plaintiff and his friends replied by nominating on behalf of their party, five men, including Morarji himself. Then one of these was rejected, and Morarji said that if they took up that attitude for the Bulls it would be necessary to nominate four men from among the Bears. Then a member, Karamsi, rose and said that at this rate they would never get to business, and he would name three men who would command the full confidence of all to fix the rate. He accordingly named Amarchand, the President of the Association, and one of the plaintiff's own men, Morarji, whom the plaintiff had himself first named, and Ransi Devraj who is a defendant. This was seconded by Bhara and according to the defendant and the minutes was carried by a show of hands *nemine dissente*. Bhimsey Bhanji and Fateh Mahomed, who were all Bulls, swear that so far from this proposition being carried unanimously they vehemently protested, but no attention was paid to them.

Now suppose, for the sake of argument, that the defendant's version is true, what would be the position? Surely an informal, but not the less quite a reasonable, submission to arbitration on lines somewhat analogous to, although no doubt different from, the ordinary lines laid down by the rules. If knowing, as they all then did, that Ransi Devraj was a Bear, and even supposing that they had lurking doubts about Morarji, yet as far as I can see having no more reason then than now to know that he was against them, while they were quite sure that the most influential man of the three (Amarchand) was on their side, they did accept these three men to fix the rate, taking their chance of one certainty *plus* one doubtful factor, against one adverse certainty, how could it be said that they did not submit the question to the decision of these three men, or that when they found that that decision was unfavorable they could repudiate it for that and that reason alone? Bhimsey, who is a very bad witness I may remark, says that he did not object to the men but to the proceedings. Immediately after he makes it plain that he did object to the men. But what seems to me more important is that he waited to see what rate they would fix. He was still taking his chance. So, though Bhimsey Bhanji and Fateh Mahomed say they protested against the constitution of the Sub-Committee it appears that they both waited for the announcement of the rate. I should have said perhaps that although Morarji evidently took the names mentioned by Bhimsey Bhanji to be those of Bulls, the witnesses themselves say that they only wanted impartial men, neither Bulls nor Bears, and that the names they gave, were those of men who to the best of their belief had no contracts for that *vaida*. Fateh Mahomed says that he went to tea after lodging his protest through Dhanji and Bhimsey, but it is clear that he waited to hear the rate, because he says he accompanied the other two, when the meeting broke up, to their solicitors to lodge another protest.

Now the defendant contends that Rule 46 is wide enough to give the Association power to deal in a difficulty like this, with the emergent question of settling the rate and to authorise the

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settlement to be made in a way which is not apparently the ordinary way or the way in which the Rules meant that it should be fixed. I do not attach much importance to that. I apprehend, though I confess that I construe these verbose and intricate rules with a good deal of diffidence, that the intention was where necessary to call a special meeting of the Association for any special emergency. No emergency was in contemplation when the meeting of the 30th November was summoned. It had been preceded by the meeting of the 24th and there was no reason to foresee any hitch or need to depart from the recognized procedure. The meeting of the 30th was a large meeting and a fairly representative meeting. That cannot be denied. But it was not summoned as a special general meeting to deal with a particular difficulty, nor when the difficulty did arise was any attempt made to meet it in that way. Unless indeed it can be argued that putting a proposition before the meeting and getting it carried in supersession of the ordinary rule went so far, I doubt it. I doubt whether if the plaintiff's party really protested, as they swear they did, and went on protesting, it could be held in any Court of law that merely by reason of their formal contract term to accept a rate fixed in accordance with the rules, any one of them upon the premises so far assumed would be bound to accept this rate. If I am so far right, it will be seen that the sustainability of this objection may really turn very largely upon what plaintiff considered relatively immaterial, namely, whether in fact he did object and persist in his objection when the departure from the rules was made. Upon this point there is a great conflict of evidence: man for man the defendant's witnesses are immeasurably better than the plaintiff's. But no Judge of experience cares to be too much influenced by demeanour and demeanour alone. The cool and hardy liar often makes an infinitely better witness to all outward appearance than the nervous, excitable, irritable man who is easily drawn by counsel, and while really speaking the truth or more of it than the other, makes a very poor show in the witness box; so that I will not press too hardly on the witnesses for the plaintiff merely because they impressed me most unfavourably. And if it were merely a question of weighing the evidence given by the witnesses them-

selves on both sides, I should not hesitate to accept the story of the witnesses for the defence. But before doing that, I cannot shut my eyes to other considerations affecting the probabilities of these rival versions of what took place at the meeting. Considering that the plaintiff had protested in advance, that he admittedly opened the discussion, by insisting upon having impartial men or at least men whom he declared or thought to be impartial on the Committee, considering further that when this proposal fell through, one at least of the three men named was a known seller on a large scale and that immediately after the rate was published the plaintiff went straight off to his solicitors to protest again, and that his party published in the papers a contradiction of the authorized version of the meeting to which the Association had at once given publicity, I must allow that there is, as plaintiff alleges, a considerable antecedent improbability that he would have assented unconditionally to the nomination and appointment of the three men to fix the rate. The point is how far that antecedent probability ought to be allowed to outweigh the positive and, as far as I can see the strong and good evidence of defendant's witnesses supported by the minute book of the proceedings? It is after all a qualified probability to this extent, that while no doubt it is most unlikely that the plaintiff and his friends were really pleased with what was being done, it by no means follows that they were so dissatisfied as to carry their early protests to the length of setting the authority of the Association openly at defiance and refusing to accept a majority vote.

Some light too is thrown upon the conflicting accounts of what really did take place at the meeting by the subsequent correspondence. Exhibit Q is the letter which the plaintiff's solicitors were instructed to write immediately after the meeting while every fact was fresh in the minds of the persons instructing them. Then too, if ever, the plaintiff's party must have been smarting under a sense of their recent injuries and defeat. If everything had been carried in a high-handed way, as the plaintiff now alleges, surely they would have made that an additional ground of protest. But do they? Not at all. Their objection is restricted to the disqualification they urge against two of the

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members. It turns upon their allegation that both Ransi Devraj and Morarji were interested, as sellers for that *taila* and they deliberately pin it down to the words of Rule 35. It might be replied that the Court would be hasty in assuming that the solicitor's letter necessarily contains everything that has been poured into his ears by two or three indignant clients. My own short experience on this side of the Court has shown me that as a rule attorneys do not err on the side of brevity or conciseness. But I will not lay too much stress on that. I will allow that a wise attorney might exercise his own discrimination in selecting from too abundant materials those which he thought would best serve the interests and the purpose of his clients. And therefore it is of course possible that the plaintiff's solicitors thought that the strongest feature in his case was what appeared to them to be the infraction of Rules 30 and 35; while the supplementary points arising out of the conduct of the meeting and the manner in which the Sub-Committee was appointed were deemed to be comparatively unimportant and negligible. But it is a little strange in view of Bhimsey's statement that it was the procedure and not the men he objected to, to find that he there and then goes off to his legal advisers and instructs them to complain of the men and not of the procedure. Nor does this letter stand alone. On the 10th December after the aggrieved parties had had ample time to deliberate and arrange their complaints, they again instruct their solicitors to write to the Association. The letter is Exhibit S. And here again we find no specific complaint of procedure though the letter certainly does seem to be to contain instructions that the instructing persons were not satisfied with it. But there is something in it which is more important, lending colour as it does to the conjecture I have hinted at, that while the plaintiff's party opposed the nomination of the three men who were appointed by a majority to fix the rate, they did not carry their opposition further than the initial stage. One at least of the dissentient members appears to have instructed the solicitors to say that finding further opposition hopeless he allowed the majority to have their way. Now that is precisely what I should have thought from the fact that Bhimsey Bhanji and Fatch Mahomed

all waited for the announcement of the rate, most probably did happen in the case of all of them. When they found that their own idea of getting a composite committee containing four at least of their own nominees appointed impracticable, and the sense of the meeting so plainly against them, it is natural that they should have acquiesced, sullenly perhaps, but still acquiesced in the motion put by Karamsi. For that at any rate gave them on the whole much better chances than, according to their views, they were likely to have if the committee had consisted of any twelve men picked up from that meeting. Observe that they say there were only three or four Bulls present. In such a committee their nominees would have been outnumbered, and owing to the undisguised manner and motives of election, they could have expected but little consideration from their opponents. Whereas in this select committee of three they had a very reasonable prospect of securing a majority. It is therefore less improbable than at first sight it appeared, that the plaintiff should have acquiesced in the appointment of Amarchand, Morarji and Ransi Devraj to fix the rate and if the plaintiff did so consent, although only tacitly, I think it would be difficult to say that he was not bound by the award, unless he could get it set aside on any of the grounds upon which awards, otherwise lawful and regular in inception, may be set aside.

Thus far of the probabilities. Now I turn to the evidence. As I have already said I regard that of the defendants as much better and more trustworthy than that of the plaintiffs. And not only this, but we have the minutes of the meeting, and these minutes positively corroborate the defendants. A great deal has been made, and very naturally made in argument out of the interlineation. This interlineation consists of precisely the passage which according to the plaintiff the defendant would have inserted had he had in mind a planned scheme to defeat the plaintiffs' present case. It says that after the nomination of the three as a special committee, full liberty was accorded to every member to speak and urge objections, but "every member present at the meeting very willingly agreed to accept whatever rate the said three persons would unanimously fix." Without the

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interlineation the minutes would have gone on "therefore as no body opposed the proposition the abovenamed three gentlemen met for nearly half an hour, etc." And it appears to me that really that passage was quite enough to serve the purposes of the defendants. It formed an undisputed part of the minutes, and it states the cardinal fact that there was no opposition. Whether anything is really gained by the amplification contained in the interlineation, may be doubted. But even supposing it was an after-thought it was a speedy after-thought. For it is certain that the words were put in the press communique which must have been sent off that evening. The evidence, leaving mere guess work aside for a moment, is that the words which now appear as an interlineation were in the Secretary's rough notes. And it certainly seems that they must have been, or they could hardly have got into the papers the next morning. The evidence is that when the minute book was written up from the rough notes, these words were omitted, and when the book was submitted to Ransi Devraj, and compared with the rough notes, he noticed the omission and ordered the Secretary to write the missing passage in. It is contended for the plaintiff that this is, on the face of it, improbable, since the minute book as originally written runs on grammatically and consistently. But surely that might account for the omission. If there had been a break in construction, the copyist must have noticed it at once. But where, if the whole interlineation be omitted the sense remains substantially the same and there is nothing wrong with the construction, it might well be that the words had been left out through a *bonâ fide* mistake. Another point taken by the plaintiff is that the rough notes are lost. But I think nothing of that. Rather I should have thought it singular had they been preserved. When a Secretary takes down rough notes of what occurs at a meeting and afterwards writes them into the permanent minute book I believe that it is commoner for him to throw away or destroy the rough notes than to keep them. This interlineation is initialled by Amarchand the President, showing that he accepted its correctness and he is, if not actually a plaintiff himself, one of the plaintiff's men. At the subsequent meeting

of the 23th December these minutes were put to the meeting in the usual way and carried and signed by the President (see Exhibit 22). Thus the official record which I see no reason to doubt bears out the testimony of Ransi Devraj and Moraji. And upon a careful consideration of all these materials I must hold that the plaintiff did consent to the appointment of Ransi Devraj, Moraji and Amarchand to fix the rate.

Doubtless a further question might arise on that whether doing so was within the scope of his authority as an agent, so as to bind the real plaintiff, who was not present at the time, and that again would lead up to a consideration of the very difficult question how far in mercantile dealings of this general and more or less stereotyped character an agent has authority to bind his principal to submit to arbitration. For it might be said that while the plaintiff does not contest the authority of his agent Ravji Narsang to sign the contract form and so to bind him to abide by all its conditions, that authority does not go the length of making him the plaintiff's representative for selecting a wholly new body of arbitrators not contemplated by the Rules. And this in turn raises another question, namely whether assuming that the rate fixed was binding upon all who were present at the meeting, and must therefore constructively at any rate be taken to have assented to the constitution of a new tribunal of arbitration, it would have the like effect upon other members who were not present. To answer that, which is really the practical question raised, it is necessary to consider I think not only from the strictly theoretical legal, but from practical mercantile side, what commonly happens in the conduct of such affairs. Where a body like the Rice Merchants Association meet to select a Committee and then empower that Committee to fix a rate, I suppose that the procedure is very much like that of any other club or lay Association. Probably it was the intention of all to abide by the rules, assuming for a moment that the rules made a particular procedure imperative. But when it was found that owing to unexpected obstruction strict adherence to the rules would lead to an *impasse*, the sense of the meeting might override the technical difficulty, and suggest a short cut to the:

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desired solution. Thus a new proposition like that of Karamsi, might be put, and then if the meeting which was essentially a general meeting carried this proposition unanimously, which is what the evidence shows happened on the 30th November, I do not see why a Court should stickle too much over the terms of particular rules. The general meeting is in the last resort the legislature of all such bodies, and the sense of a general meeting ought to be enough, I should think, to warrant a formal departure from the ordinary procedure. I say a formal departure because after all what was carried at this meeting and then done, does not appear to me inconsistent with the spirit of the Rules. Nor was it after all such a very startling innovation. On a previous occasion, as I have said, a very small Sub-Committee fixed the rates. It was not quite so small as this, and I do not think it laboured under the one special defect upon which the plaintiff insists, that all its members were not members of the standing Sub-Committee. But the object of the Association in procedure under Rule 30 is to get a rate fixed to be the standard of differences. And if a general meeting chose to say, "For this *raida* we are content to take a rate fixed by three of our leading men, I do not think that this really constitutes any great deviation in principle from what Rule 30 intended. A good deal has been made out of the plain advantage that was to be secured by maintaining the members of the Sub-Committee at a high figure, say ten or twelve. But is this really so great an advantage as it is made to appear? If the Committee consisted of ten Bears and only two Bulls, which might well happen, the Bulls would be in a far worse position than if it consisted of one Bull and one Bear, and one doubtful member. For what do we find that the procedure in fixing the rates has ordinarily been? All the members apparently write down what they consider the *raida* rate should be. It appears that first a rough measure is agreed upon, and all are bound not to vary more than four annas above or below it. Then when all the members have stated the figure each has chosen, an average is struck and that average is accepted as the *raida* rate. Whether the body consists of three or ten, there is not likely to be much practical difference, unless the

whole body be of one mind, when no doubt an unfair rate might easily be announced. Now if we turn again to Rule 46 we find that the Association clearly contemplated cases of difficulty and emergency, and that it provided that in all such cases a general meeting of the Association should be called, and the decision is to bind all persons. Difficulties arising out of the Sub-Committee being unable to do the work are specially contemplated. And though, as I have said, there is a difference between calling a general meeting as a last resort to surmount some unforeseen difficulty of that kind, and dealing with it at a general meeting at which it has arisen, the difference is less real than nominal. Of course it might be contended that as soon as it was known that a general meeting was to be convened for the purpose of acting under Rule 46 every member who was interested in the point in dispute would attend, and insist upon having a hearing; while if that were not known, anything might be rushed through an ordinary general meeting which might prove highly detrimental to absentees. I allow that there is a good deal of force in that. But we have to remember that in this instance there was a subsequent general meeting convened, with the object of allowing the malcontents to be heard. They would not attend, and in the result a general meeting did ratify what had been done at the previous general meeting. And this introduces the principle of ratification upon which the defendant relies. The rule in *In Re London and New York Investment Corporation*⁽¹⁾ and *In Re Portuguese Consolidated Copper Mines Limited*,⁽²⁾ might with little straining be extended to cover the present case. But I am not quite sure that I ought to rest too confidently on those cases. In the first case the Memorandum of Association provided that preference shares might be issued on such terms as the Company should by special resolution determine. Preference shares were issued without any such special resolution. But at meetings subsequently held and attended by all classes of shareholders, resolutions were unanimously passed, adopting the terms under which the preference shares were issued. It

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(1) [1895] 2 Ch. 860.

(2) (1890) 45 Ch. D. 13.

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was held that the imperfect issue of preference shares was capable of ratification and had been ratified. In the second case the Articles of Association of the Company provided that the shares should be allotted by the directors, and that the first directors should be appointed by the subscribers to the Memorandum of Association. An allotment was made at a meeting which the Courts subsequently held was irregular and the allotments were consequently invalid. Notice of the allotments was sent on the following day to A. B. A. refused to pay the allotment money on his shares, B. paid his to the Bankers under protest, but the evidence failed to prove that either of them revoked his application, or repudiated his shares, on the ground of the allotment being invalid. Later the Company brought an action against A. for the allotment money and recovered judgment. Later another meeting of directors was held at which only two attended and they passed a resolution, that the certificates of the shares allotted should be sealed and issued to the allottees. B. refused to accept the certificate of his shares, but did not distinctly repudiate the allotment. Another meeting of directors was held at which all four in number attended, and the chairman signed the minutes of the last meeting. At a later duly constituted meeting of the directors a resolution was passed formally confirming the allotment of shares made at the previous meeting of the 24th October. A. B. then moved for a rectification of the register by striking out their names. It was held that although the original allotment of shares was invalid, it had been ratified by the Company and was binding on the allottees. It is, I think, plain that there are points which might distinguish that from the present case. The former appears to be more directly in point. But there too there appears to have been no dissent or repudiation by any member of the Company at any time: just as in the latter case the allottees did not repudiate till long after the ratification. Here however we have to reckon with an immediate protest made before (according to the view of the plaintiff) the general meeting of the 29th December had ratified what was done at the meeting of the 30th November. And on the whole I am very doubtful whether if there was any departure from the Rules at the meeting of the 30th what was

done as a consequence of that departure could be made binding on any one who protested and refused to accept it before ratification, by a subsequent ratification on the 29th December.

But it is first important to be sure that there was any real violation of the Rule regulating the fixing of the *vaida* rate. That Rule says that the Sub-Committee shall fix the rate. It does not say how many of the Sub-Committee, and though surely the natural reading of the rule would give by implication a command that no one who was not on the standing Sub-Committee could be associated with members who were on it, for the purpose of fixing the *vaida*, that conclusion seems to me to be somewhat shaken by the proved fact that some twenty names at least were submitted, from whom the Sub-Committee to fix the rate was to be chosen. Turn now to Rule 31. That provides that any three gentlemen of the above Sub-Committee may meet at Association's room, and transact all the business of the Sub-Committee, but that without the sanction of the President or the Vice President and the Secretary, they shall not be able to give any decision, and a decision given without such sanction shall be considered as null and void. Now that rule, while to a certain extent it may be thought to help the defendant as showing that three form a quorum of the Sub-Committee for the purpose of giving provisional decisions, yet on the other hand it favours the plaintiff inasmuch as it seems clearly to confine this kind of authority to members of the Sub-Committee. I do not think that the Rules anywhere provide for the election of new members to the Sub-Committee. And it might therefore be open to the defendants to contend that when business had to be done by the Sub-Committee and the Sub-Committee only, a vote at a general meeting including, for the purposes of doing that business, a member who was not a member of the Sub-Committee was tantamount to appointing him a member of the Sub-Committee for that special purpose. But I doubt whether that would not be going too far in the way of construction. And on the whole I gravely doubt whether looking to the words of Rule 30, and to the fact that Morarji was not a member of the standing Sub-Committee the fixing of the rate at the meeting of the 30th could bind anyone who was not present at that meeting and a consenting party to

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the appointment of the three arbitrators, and who did protest before the proceedings of the meeting were ratified.

I must observe here that I do not think that there is any force in the objection which the plaintiff took from the first and has chiefly insisted upon ever since, namely, that these Arbitrators were not impartial within the meaning of Rule 35. That Rule, as I have I hope, made plain in the earlier part of this judgment was framed in my opinion to meet altogether different disputes, than such as might be permanent and recurrent over the fixing of the *vaida* rate. I do not read that rule in the sense in which the plaintiff has read it from the first. Nor do I think that the Association ever intended to exclude from the Sub-Committee entrusted with the fixing of the *vaida* rate, every member of the Association who might have contracts for that *vaida*. So that, if as I find, the plaintiffs' representative, whom I have loosely called the plaintiff, was present at this meeting of the 30th and himself took part in the proceedings and acquiesced in the appointment of the three men as arbitrators to fix the rate under Rule 30 I do not think that he could evade liability under the rate fixed for no better reason than that one of the men had contracts on a large scale for that *vaida*. *Ellis v. Hopper*⁽¹⁾ seems to me to be a strong authority for this proposition, nor do I think that plaintiff was at all successful in his attempts to distinguish it. Such cases as he cited upon the broad general principle that no man interested may be a Judge seem to me to turn on wholly different considerations. Thus if the plaintiff himself had stood in the shoes of his agent at this meeting I think that he would have been bound by the rate which was then fixed, unless he could have shown that over and above what he now puts forward as the principal ground, namely the disability under which he knew at the time that one of the chosen arbitrators was labouring, there was some fraud or dishonesty against which the Court would on general principles relieve him.

Is the case altered because the plaintiff in person was not at the meetings? I doubt it. It is true that I do doubt very seriously whether as the law stands an agent may bind his

(1) (158) 3 H. & N. 766.

principal to arbitration. But here the principal admits that he had allowed his agent to bind him to one kind of arbitration, and it would be stretching the legal principle which has already occasioned grave inconveniences in the larger mercantile communities of this country, further than is either necessary or desirable to say that an agent empowered to pledge his principal to one kind of arbitration is not empowered to pledge him to another, which is, in essence, after all, precisely the same. In my opinion the plaintiff is bound by the *vaidā* rate which was fixed at the meeting of the 30th November, although I am not prepared to say that that *raida* rate would bind members who were not at the meeting and protested before the proceedings of that meeting were ratified in the meeting of the 29th December.

So far then as this point goes, namely, whether the plaintiff is bound by the rate fixed nothing remains to be considered but this, whether being first bound to the submission and consequent award fixing the rate, he is freed from that obligation by any misconduct or fraud or disability, on the part of or in, any of the persons conducting the arbitration. And to that I must give a short answer in the negative. As to the mere fact that one at least of these three was himself interested in contracts for that *vaidā*, I have said enough to show, that in my opinion and having regard to the constitution of the Rice Merchants Association, and the usual course of business here, the fact alone would not be and had never been thought to be a disqualification. And as to what was done by the specially appointed Committee, I do not find any trace anywhere of so markedly an improper bias, or partiality or misconduct, as would justify a Court in setting aside their award. True no parties were heard before them; but then, for this particular business, no parties ever are, and that must be taken to be a known and implied condition of the submission. We know exactly what did happen at this meeting. We know that Ransi Devraj suggested the lowest rate; that was to be expected and if we look at the records of other meetings of this Subcommittee we shall find that while some members suggest a high, others suggest a low rate. But the entire difference in

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this meeting between the highest and the lowest rate suggested was inconsiderable. A mere matter of two annas and a half. Bearing in mind that Amarchand was quite as interested in getting a high rate fixed, as Ransi Devraj was in getting a low rate fixed, while apparently Morarji was impartial. I would not say that Ransi Devraj's suggestion to fix the rate 8-10-0 indicates any dishonest bias or partiality. It is much more important to note that Amarchand himself who is the plaintiff's man did not put the rate higher than 8-12-6, while Morarji thought it ought to be 8-11-0. I am not therefore able to accede to the plaintiff's contention that the award of this body ought now to be set aside as having been improperly procured or infected with fraud or partiality.

Before dealing with the last material question, what was the true market rate for the big mill Rangoon rice on the 30th November 1906 I must say a few words about one or two incidental points. The plaintiff sues on a contract. He alleges therefore a breach on the part of the defendant. The defendant in his turn sues on the same contract by way of counterclaim; and it is contended that he cannot prefer any such claim because he does not even allege that there was any breach on the part of the plaintiff. The ordinary law on this subject is contained in section 93 of the Indian Contract Act. "In the absence of any special promise the seller of goods is not bound to deliver them until the buyer applies for delivery." Primarily, then, the initiative rests with the buyer, and if the buyer makes no demand in the absence of a special promise, no obligation lies on the seller to tender. But in this case the contract in suit was made subject to all the Rules of the Association, and condition 4 on the back of the contract, (which is a compendious reproduction of Rule 17 of the Association), runs as follows: "Excepting the *kabalas* made, in the name of an incoming steamer, in connexion with other *vaida kabalas*, during the *vaida* period, whenever before the last five days of the *vaida*; the party selling may give to the party purchasing the delivery order in respect of the *vaida* goods in accordance with the aforesaid rules, the party purchasing is bound to take the same, then, and

thereafter he is bound to take the goods appertaining to such order in accordance with these rules. The party selling is bound to send to the party purchasing the delivery order five days before the last day of the *vaida* period." I confess that the first part of that rule does not convey a very clear meaning to my mind. But the upshot of it all seems to be that the seller must send a delivery order to the buyer five clear days before due date. I now turn to Rule 17. It provides in plain English that a seller may send a delivery order any time within the *vaida* period five clear days before the due date. Then 'the purchaser shall have to take that delivery order and the goods mentioned therein in pursuance of these Rules. The vendor shall have to send to the purchaser the delivery order at least five clear days before the last day of the period mentioned in the contract—a purchaser will not be considered bound to accept any delivery order that is received after that time, but both the parties shall be bound to receive and pay the profit and loss according to the difference between the rate fixed or settled on the due date, and the rate mentioned in the *kabali* and the receipt and payment in respect thereof shall be made immediately after the due date." This again is by no means as explicit as might be wished. But it seems to me to mean, that if a delivery order is sent five clear days or more before the *vaida*, the purchaser must accept the goods; if it is not, then the parties are to settle on the differences only, measured according to the *vaida* rate fixed for due date and the same meaning appears to me to be deducible from the language of Rule 30.

That Rule has two possible applications. First, it may be contended that a member of the Association is bound by the rate fixed under it to this extent, that in any difference which may arise over non-fulfilment of a *vaida* contract, that rate is to be taken as the measure of the differences. Second, it may be contended that the latter part of the rule goes further and really provides that where a *vaida* contract has been made, the parties to it, whether either or both are guilty of breach, are in the same position with regard to the settlement, that is to say, that the party guilty of, as well as the party innocent of, the breach may equally claim profits on the *vaida* rate. And

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that means of course that all parties so agreeing to be bound by that rule are contemplating gambling contracts. Because the law would certainly not consider the claim of any party for damages calculated on such a basis if he himself were the party who had committed the breach. No doubt what the framers of that rule might have had in view, is that by implication no party, benefiting by the *vaida* rate, would have committed a breach, and therefore it is merely a short way of avoiding intermediate steps, or possibly it might be more correct to say that the framers of the rule did not contemplate any party who, if he had literally fulfilled his contract would have made a profit, wilfully committing a breach of it. And so it was broadly laid down, that whether the contract was fulfilled or not, and irrespective of all enquiry as to whose fault it was that it was not carried out, it would be enough to produce the *kabala*, compare the rate with the *vaida* rate fixed on the due date and then make the contracting parties settle differences accordingly. It does not necessarily follow that if that is a correct interpretation of the intention of the framers of this Rule, it was meant to regulate gambling contracts only. Many perfectly *bond fide* contracts which, with the best intention in the world to fulfil them, one of the parties had been unable to do so, although if he had, he would have made a profit, would likewise fall to be included in it. However that may be, it certainly does seem to me that while a person might be bound by the *vaida* rate, that is to say, has to take that as the measure of his damages, when he came into Court to claim them, he might very well contend that he certainly was not bound by the rest of the rule which ignores a fundamental legal principle that only the party who is innocent of the breach can claim damages. It is also I think clear that under these rules the seller has to send a delivery order five clear days before due date. Admittedly the defendant did not do so. The plaintiff called upon him for a delivery order; but the defendant contends, setting the rules aside as far as I understand him, that that was not a demand for fulfilment, it was not a demand for delivery but merely for a delivery order, and as he was always ready and willing to deliver the breach was due to the plaintiff. I may observe in this connexion that Rule 17

cannot be meant to be always strictly enforced. For we have it in evidence that these *voida* contracts are not infrequently made with in less than five days of the due date. In such cases it is obvious that the condition prescribed by Rule 17 becomes impossible of fulfilment. Still, where contracts are made under the Rules, in time for the seller to comply with them, I think it is enough, if he fails to do so, to give the buyer a cause of action for breach. To this extent, the plaintiff is, in my opinion, right.

What the defendant's position is, in respect of his counterclaim, is not so easy to determine. Except upon the hypothesis that it was never the intention of either party to do more than pay and receive differences, it is difficult to understand how a man who admits that he did not send the delivery order which he was bound to send as a condition precedent to the completion of the contract can claim any damages because it was not completed. I have very little doubt in my own mind that this and a good many other *voida* contracts made and settled under the rules of the Association are purely gambling contracts. The parties have no intention of buying or selling anything, and in such circumstances, it is natural that they should consider themselves under mutual obligations, when the *voida* rate is declared to pay or lose on the figure at which they had respectively elected to sell or buy. But I do not see how a Court of law could be asked to enforce any such understanding even though the contract may be made under the Rules of the Association, and those Rules may contemplate that peculiar kind of dealing. On that point too, I think, the plaintiff is right.

I will now give my decision upon the question of fact, what was the market rate on the 30th November 1906? [His Lordship then examined the evidence given as to market rate on the 30th November 1906 and concluded—]

Still taking the evidence as a whole, and allowing that it is far from good evidence, the Court must do the best it can with it. And after carefully considering it, testing it by the ordinary tests, and looking at it too in the light of surrounding circumstances, and general probabilities, I must conclude that the *voida* rate of 8-11-0 fixed at the Association Meeting of the 30th November fairly represents the market rate of that day.

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On that finding, apart from the former finding that he is bound by the rate fixed on the 30th November, the plaintiff would again fail on the merits.

But I must add that I do not see my way to allowing the defendant's counter-claim. I have already given my reasons and need add nothing to them.

It was urged on behalf of the plaintiff that because this suit occupied many days in trial, and because the judgment took two hours to read, it must have been a proper suit to bring in the High Court. I do not see any force in that argument. The case was deplorably protracted, but not on the only points upon which it could properly be said that there was any reason at all to withdraw it from the ordinary tribunal. Almost all the time was spent upon two points, the alleged partnership of Khoorpal Dungeersey with the plaintiff, and proving what the true market rate was. Certainly there was also a good deal of evidence about what occurred at the meeting of the 30th. But that evidence, confined to that point only might as well have been sifted in the Small Cause Court. I am most strongly opposed on principle to encouraging parties who might have their differences settled cheaply and expeditiously in the Small Cause Court to come into this Court. After giving this matter long and careful consideration I have come to the conclusion, that in all the circumstances of the case, I ought not to give the plaintiff the certificate he wants under section 22 of the Small Cause Court Act.

As to the failure of the defendant on his counter-claim, I should find it hard to say that any appreciable time was spent over that, certainly not enough to give the basis of any fair fractional calculation. I must, therefore, dismiss the suit, and refusing the certificate under section 22 direct that the plaintiff do pay the defendant's attorney and the client costs. Two Counsel certified for.

Suit dismissed.

Attorneys for plaintiffs: Messrs. *Bhaishankar, Kanga and Girdharlal.*

Attorneys for defendants: Messrs. *Wadia, Ghandi and Co.*

APPELLATE CIVIL.

*Before the Hon'ble Mr. Justice Chandavarkar, Acting Chief Justice, and
Mr. Justice Heaton.*

BHACHUBHA MAVSANGJI (ORIGINAL DEFENDANT), APPELLANT, v.
PATEL VELA DHANJI AND ANOTHER (ORIGINAL PLAINTIFFS), RE-
SPONDENTS.*

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*Tálukdár's (Gujaráth) Act (Bom. Act VI of 1888), section 31†—Tálukdár's
estate—Tálukdár's estate—Estate held by a Tálukdár on any other tenure.*

The expression Tálukdár's estate means only the estate held by a Tálukdár on Tálukdári tenure and not property held on any other tenure which is distinguishable from the former.

Khodabhai v. Chaganlal(1) followed.

SECOND appeal from the decision of N. R. Majmundar, First Class Subordinate Judge of Ahmedabad with appellate powers, reversing the decree of G. M. Pandit, Second Class Subordinate Judge of Dhanduka and Gogha.

The two lands in dispute situate at the village of Bhadiyad belonged to the minor defendant's deceased father Mavsangji Samatsangji who had mortgaged them with possession to the plaintiffs' deceased father under a registered deed, dated the 15th May 1903. Subsequently Mavsangji died leaving him surviving a son, the minor defendant. Mavsangji being a Tálukdár, the Tálukdári Settlement Officer, Gujaráth, became the guardian of

* Second Appeal No. 245 of 1903.

† Section 31 of the Gujaráth Tálukdárs' Act (Bom. Act VI of 1888) is as follows :—

31. (1) No incumbrance on a Tálukdár's estate, or on any portion thereof, made by the Tálukdár after this Act comes into force, shall be valid as to any time beyond such Tálukdár's natural life, unless such incumbrance is made with the previous written consent of the Tálukdári Settlement Officer, or of some other officer appointed by the Governor in Council in this behalf.

(2) No alienation of a Tálukdár's estate or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made by the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the Tálukdár.

(1) (1907) 9 Bom. L. R. 1122.

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the minor defendant and took charge of his estate. Under the order of the Talukdári Settlement Officer, the Taláti of the village in the year 1906 attached the produce and recovered the income of the mortgaged fields which under the mortgage-deed were in the possession of the mortgagee. The mortgagees thereupon brought the present suit against the minor defendant represented by his guardian the Talukdári Settlement Officer for an injunction against the defendant restraining him from taking the produce of the mortgaged property and for the recovery of Rs. 67-13-0 illegally levied by the defendant from the plaintiff's on account of the produce and income of the lands.

The defendant did not admit the mortgage-bond sued on or payment of any consideration therefor, and contended that the deceased Mavsangji was the Talukdár of Bhadiyad and other villages and that the plaintiff's mortgage transaction was invalid as it was entered into without the sanction of the Talukdári Settlement Officer.

The Subordinate Judge found that the mortgage sued on, though proved, was void for want of sanction under the Talukdárs' Act. He, therefore, dismissed the suit.

On appeal by the plaintiffs the appellate Court found that the mortgage in suit was not ineffectual under section 31 of the Talukdári Settlement Act (Bom. Act VI of 1888). It, therefore, reversed the decree and allowed the claim. The reasons were as follows:—

It is contended on behalf of the defendant that the fields mortgaged are a Talukdár's estate within the meaning of section 31 of the Talukdárs' Act and that the mortgage is not binding on the defendant as it was not effected with the sanction required by that section. The mortgaged fields Survey Nos 1082 and 1092 are situated in the village of Bhadiyad. This village is a Government and not a Talukdári village (exhibit 31); and in the Revenue Records Survey No. 1082 has been described as 'Political Inam' and Survey No. 1092 as Government land (see exhibit 29). I agree therefore with the lower Court that the lands in question are not a 'Talukdári estate'. That Court however seems to have held that the words 'Talukdár's estate' as used in section 31 of the Talukdárs' Act means every sort of landed property belonging to a Talukdár; and for this position reliance has been placed on *Parshotam v Bai Punji*, 4 Bom. L. R. 817. This case, however, simply decided that the expressions a Talukdári estate and a Talukdár's estate are not synonymous, that the former expression means "an estate of Talukdári tenure;" and that an estate of that

tenure, though held by a person other than the Tálukdár, is none the less a Tálukdári estate. "It does not give the meaning of the term 'Tálukdár's estate'. The meaning of that expression is given in the recent case of *Khodabhai v. Chaganlal*, 9 Bom. L. R. 1122. It lays down that the expression 'Tálukdár's estate' must be interpreted as meaning an estate held by the Tálukdár as a Tálukdár". Here one of the mortgage fields has been held by the defendant as an occupant and the other as an Inamdar. They cannot, therefore, be called a Tálukdár's estate; and so no sanction was necessary for their mortgage.

The defendant preferred a second appeal.

Jayakar with *R. W. Desai* for the appellant (defendant).

Setalvad with *L. A. Shah* for the respondents (plaintiffs).

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CHANDAVARKAR, Ag. C. J.:—The question of law in this case is whether the expressions "Tálukdár's estate" and "Tálukdári estate" occurring in section 31 of the Tálukdárs' (Gujarath) Act VI of 1888 include the estate held by a Tálukdár on any other tenure than Tálukdári.

The question is really beset with difficulties of construction, because the language of the section itself, and, in fact, of the Act, are rather obscure upon the point. Very careful arguments have been addressed to us on either side; and if the question were *res integra*, I should have taken time to consider it more carefully. But I think that, in principle, the point arising in the present case is the same as that decided in *Khodabhai v. Chaganlal*⁽¹⁾. There it was held that the expression 'Tálukdár's estate' meant only the estate held by a Tálukdár on Tálukdári tenure, and not property held on any ordinary tenure, which is distinguishable from the former.

That is a decision of a Division Bench of this Court. It was passed two years ago, and, unless I find that it is clearly erroneous, we must follow it. If I could not agree with that decision, the case would have to be referred to a Full Bench. I see no reason to disagree, and I do not think that the circumstances of this case call for any such reference. The Act is obscurely worded and if the decision in *Khodabhai v. Chaganlal*⁽¹⁾ is wrong, the Legislature is at hand to correct that decision and amend the law.

⁽¹⁾ (1907) 9 Bom. L. R. 1122.

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Accordingly the decree must be confirmed with costs.

HEATON, J.:—As a party to the decision in *Khodabhai v. Chaganlal*⁽¹⁾, there are a few words I should like to say. I have heard a very elaborate argument and after hearing and considering it there is not one word in my judgment in the previous case which I should wish to alter. There we came to a decision on the ground that the property under consideration was not property held by a Tálukdár as such and therefore was not property which was covered by the provisions of section 31. And that is precisely the reasoning which seems to me right in determining the present case.

It is found as a fact by both the lower Courts that the lands which are now in dispute are not held under a Tálukdári tenure, that is to say, they are not held by a Tálukdár as such. That being so, it seems to me that they are not lands of a kind on which section 31 is intended to operate.

It is perfectly true that Bombay Act VI of 1888 is a very difficult Act to understand; indeed, speaking for myself, I can say, in some particulars, it is an Act which it is impossible to understand. But giving it the best attention I can, I see no reason whatever for doubting that the decision arrived at two years ago was a correct one.

Decree confirmed.

G. B. R.

(1) (1907) 9 Bom. L. R. 1122.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

SANGIRA MALAPPA BIN AYAPPA (ORIGINAL DEFENDANT No. 1),
APPELLANT, v. RAMAPPA BIN SANGAPPA PATTUR AND ANOTHER
(ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS*.

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Evidence Act (I of 1872), section 92—Written agreement—Sale-deed—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, &c.—Oral agreement cannot be pleaded.

Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void.

SECOND appeal from the decision of C. E. Palmer, Acting District Judge of Bijapur, reversing the decree passed by V. G. Sane, Subordinate Judge of Bagalkot.

On the 15th December 1886 the plaintiff sold his house to defendant No. 1 by a registered sale-deed. The latter sold it to defendant No. 2 by a registered sale-deed on the 13th October 1903.

The plaintiff filed this suit on the 14th October 1904 to recover possession of the house. He alleged that the sale was in reality a mortgage, for contemporaneously with the written deed of sale there was an oral agreement to treat the sale as a mortgage, and to restore the possession of the house on repayment of Rs. 200.

The defendant No. 1 denied the oral agreement.

The Subordinate Judge held that the plaintiff could not be allowed to prove the oral agreement set up by him; and he therefore dismissed the suit.

On appeal, the District Judge was not satisfied with the findings of the Subordinate Judge: he therefore remanded the case for determination of the following issues :—

1. Does plaintiff prove any fact which would invalidate the document or entitle him to any decree or order relating thereto?

* Second Appeal No. 593 of 1908.

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2. Is plaintiff entitled to any and what relief ?

The Subordinate Judge returned an affirmative finding on the first issue ; and on the second he found that the plaintiff was entitled to recover the property on payment of the debt due. His reasons were as follows :—

Mr. Sane, who decided the suit in this Court, relied on the ruling in *Keshavrao v. Raya*⁽¹⁾ and excluded from his consideration the evidence of the circumstances which were supposed to be the existence of an oral agreement contemporaneous with the deed of sale. The case of *Keshavrao v. Raya*⁽¹⁾ was decided in January 1906. It seemed to follow the ruling in *Dattoo v. Ramchandra*⁽²⁾ decided in 1905 and to ignore the decisions of the Bombay High Court prior to *Dattoo v. Ramchandra*⁽²⁾. Then followed the case of *Abaji v. Laxman*⁽³⁾ referred to by the District Court in the foregoing order. This case was decided in June 1906. By it, the effect of the ruling in *Dattoo v. Ramchandra*⁽²⁾ was modified. In July 1906 followed the case of *Navalbai v. Sivubai*⁽⁴⁾ and in August 1906 the case of *Krishna Bai v. Rama*⁽⁵⁾. By these two last cases the ground lost by the decisions preceding them is greatly re-claimed.

In *Navalbai v. Sivubai*,⁽⁴⁾ it is said : "So in this case if the plaintiffs were told that the document, which in form is a sale-deed, would not be enforced as such against them, and on the faith of that representation Hariba executed the document, then the sale-deed cannot be upheld as against him or the plaintiffs as a sale-deed."

The case of *Krishna Bai v. Rama*⁽⁵⁾ pointedly calls attention to this statement of law. The effect, therefore, of the recent rulings would appear to be that evidence of contemporaneous representations or of conduct of parties may be admitted, not for the purposes of proving any oral agreement, contradicting, varying, adding to or subtracting from the terms of the document but for the purpose of proving that the parties understood that the document was not intended to operate at all as a sale-deed though in form it bore that character. Mr. Justice Heaton's observations in *Krishna Bai v. Rama*,⁽⁵⁾ seem to support this view.

In this view of the law on the subject I find that there are ample materials in this case to hold that the document was not intended to operate as a sale.

The witnesses for plaintiff, Exhibits 58 and 59, state that the sale transaction was only colourable and that the parties understood that the sale-deed in reality represented a mortgage. Even apart from this evidence, about the admissibility of which there may be yet some question, I think there are circumstances

⁽¹⁾ (1906) 8 Bom. L. R. 287.⁽³⁾ (1906) 30 Bom. 426.⁽²⁾ (1905) 30 Bom. 119.⁽⁴⁾ (1906) 8 Bom. L. R. 761.⁽⁵⁾ (1906) 8 Bom. L. R. 764.

which show that defendant No 1 understood that the sale-deed obtained by him was not to operate as a sale-deed.

Firstly, there is the circumstance of the house and the land which had been sold only for Rs. 200, being really worth more than that. The house itself has been conveyed by defendant No. 1 to defendant No. 2 for Rs. 200. The land would appear from the rent notes produced capable of yielding rent of Rs. 26 to 40. This means that the land itself is worth Rs. 250 to 350. It is unlikely that property worth Rs. 400 to 500 was intended to be sold for Rs. 200 only.

Then there is the circumstance of the land and the house having continued in possession of the plaintiff ever since the sale-deed of 1886 till about 1902, that is, for 16 years. The khata of the land has been all along allowed to remain in plaintiff's name.

In rural parts of Deccan great importance is attached to the khata, and the omission to obtain a transfer of it from the vendor's to the vendee's name, in the absence of any satisfactory explanation, may be taken to be an indication of the ownership of the land not having been understood to have passed to the apparent vendee.

It is further significant that the assessment receipt books, Exhibits 51 and 52, show that during 1886 to 1891, that is, for 5 years after the deed of sale, the assessment was paid by the plaintiff. The receipt book for the years 1891 to 1897 is not in existence. The plaintiff says he has paid the assessment for those years also. Defendant No. 1 has got accounts. He has produced extracts of them. They do not show that the defendant No. 1 has paid the assessment for those years. It is not also explained by defendant No 1 why plaintiff paid the assessment for those years, and why defendant No. 1 did not credit to plaintiff in those years the assessment paid by him for defendant's land. The payment of one year, that is, of 1896, is accounted for. It is provided in Exhibit 43 that plaintiff should pay the assessment for that year. But rent-notes Exhibits 37, 41 and 42 which are for the years 1889, 1890 and 1891, do not stipulate that plaintiff should pay the assessment for those years, yet the assessment for the years is paid by plaintiff. This could be only on the assumption that plaintiff was regarding himself as the owner of the land in spite of the deed of sale.

Lastly, the most significant fact is the following. From the extracts of accounts produced by defendant No. 1 it appears that in Exhibit 77 an item of rupee 1 annas 8 and in Exhibit 89 an item of Rs. 5, Re. 1 and of Rs. 21 annas 13 are debited to the plaintiff on account of outlay on improvements or watching of crops. If the plaintiff was only a tenant the outlay of Rs. 21 annas 13 made for removal of weeds from defendant No. 1's land would not in defendant No. 1's account be debited to plaintiff. This furnishes an almost unanswerable argument for holding that defendant No. 1 understood that the sale-deed was not to operate as a sale-deed at all.

All these facts prove that the plaintiff is entitled to an order relating to the sale-deed to the effect that the sale-deed was not understood by the parties to

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operate as a sale-deed transferring the rights of ownership from the plaintiff to the defendant No. 1.

The District Judge agreed with these conclusions and decreed the suit in plaintiff's favour.

The defendant No. 1 appealed to the High Court.

V. G. Ajinkya for the appellant.—The oral agreement contradicting, varying, etc., the written contract cannot be proved: see section 92 of the Indian Evidence Act (I of 1872); *Balkishen Das v. Legge*⁽¹⁾. Here fraud or misrepresentation is neither alleged or proved. The cases relied upon by the lower Court are all cases where one party induces another to enter into a transaction by representations, etc., and who but for such representation, etc., would not have entered into it.

K. H. Kelkar for the respondent.—In this case the District Judge has found that there was an agreement to recover the property: and on remand, the Subordinate Judge has found that the sale-deed was not understood by the parties to operate as a sale-deed. These findings must mean that the defendant had represented to the plaintiff that the transaction was not to be enforced and on the faith of such representations or inducement the plaintiff passed the deed in question. See *Pertab Chunder Ghose v. Mohendra Purkait*⁽²⁾.

CHANDAVARKAR, J.:—The learned District Judge has found upon the evidence that there was between the plaintiff and the first defendant an oral agreement, at the time the formal sale transaction was arranged, to reconvey the property on payment by the latter of Rs. 200; and he has held that the said agreement is a fact which, under the proviso to section 92 of the Indian Evidence Act, entitles the plaintiff to have the sale-deed executed by him in favour of the first defendant set aside and to recover the property on payment of Rs. 200. In support of this view the learned District Judge has relied on two decisions of this Court: *Keshavrao v. Raya*⁽³⁾ and *Abaji v. Iaxman*⁽⁴⁾. These decisions followed *Pertab Chunder Ghose v. Mohendra Purkait*⁽²⁾. In this last case the facts were that the plaintiff therein had induced his

⁽¹⁾ (1899) L. R. 27 I. A. 58.

⁽³⁾ (1906) 8 Bom. L. R. 287.

⁽²⁾ (1889) L. R. 16 I. A. 233.

⁽⁴⁾ (1906) 30 Bom. 426.

tenants to sign certain *kabulayats* by representing that certain stipulations therein, to which they had objected before signing, would not be enforced. It was held that that "statement of the effect of the law was a misrepresentation." Their Lordships said:—

"Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of equity, considered as having been obtained fraudulently. If such a representation had not been made the tenants might have refused to sign the *kabulayat*. Further, if there is any stipulation in the *kabulayat* which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the *Kabulayat* is not the real agreement between the parties, and the plaintiff cannot sue upon it."

The facts in the present case before us are entirely different. The plaintiff has never alleged either in his pleadings or in his deposition that he was induced to sign the deed of sale executed by him under any misrepresentation. His case throughout has been that by the agreement of both parties the transaction between them was reduced to writing as one of sale of the property to the first defendant with a contemporaneous oral agreement that it should be treated as a mortgage. That was his allegation in the plaint and that is what he and his witnesses, relied upon by both the Courts below, state in their depositions. To this state of facts neither the proviso to section 92 of the Evidence Act nor any of the decisions above cited, applies. There is no element of fraud, or misrepresentation or failure of consideration or the like in them to render the deed of sale invalid. Mr. Kelkar, the learned pleader for the respondent, in supporting the decree of the Court below, has argued that the first defendant's promise to enforce the deed of sale as a mortgage and his refusal now to abide by that promise, amounts to misrepresentation and brings this case within the principle of the Privy Council decision above mentioned. But that is not an accurate way of stating the principle. What their Lordships laid down is that where one party to a contract does not agree to any of its stipulations and the other party induces him, not indeed to agree to it, but to its formal insertion in the written contract, by representing that the stipulation in question would be in reality

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treated by him as a dead letter, it cannot be enforced, because the party induced had never assented to it, and its inclusion in the written contract was the result of misrepresentation. It was the result of a misstatement of the intention of the party inducing, and such a misstatement is one of fact and an action of deceit may be founded on it. *Edgington v. Fitzmaurice*⁽¹⁾.

In the present case there was no inducement of one party by the other; no want of assent at any time on the part of the plaintiff to the execution of a deed of sale and no misstatement of his intention by the first defendant which led the plaintiff to sign the deed of sale. According to the finding of the District Judge, and indeed according to the plaintiff's own pleadings, both parties from the beginning arranged the terms by mutual agreement; there was no misleading of the one by the other; and the intention to treat the deed as a mortgage rather than sale was not due to any misstatement by the first defendant. Such a case is governed by the decision of the Privy Council in *Balkishen Das v. Legge*⁽²⁾.

For these reasons the decree of the District Court must be reversed and that of the Subordinate Judge restored with costs throughout on the respondent (plaintiff).

HEATON, J.:—It is now well understood that a contemporaneous oral agreement to vary the terms of a deed should not be allowed to be proved, for the purpose of varying or adding to the terms of a deed; that is, where, as in this case, section 10A of the Dekkhan Agriculturists' Relief Act does not apply. In this case, however, the only circumstance established by way of invalidating the deed, is proof of such an oral agreement. I cannot find from the judgments of the lower Courts that anything else is established. It is not found explicitly, or even, so far as I can see, impliedly, that the sale-deed did not represent the real agreement between the parties. If that had been found then the deed would have been invalidated: see *Navabai v. Sivubai*⁽³⁾. What is found is that there was a sale-deed which both parties understood and considered to be a contract between them and

⁽¹⁾ (1895) 29 Ch. D. 459.

⁽²⁾ (1899) L. R. 27 I. A. 58.

⁽³⁾ (1906) 8 Bom. L. R. 761.

that by an oral agreement a subsequent reconveyance was provided for. The District Judge proceeded quite correctly in his order framing issues for trial, and had in mind what it is essential to remember in cases of this kind, *viz.*, that a sale-deed cannot be construed as or converted into a mortgage-deed (that is where section 10A of the Dekkhan Agriculturists' Relief Act does not apply) but that the person who executed the sale-deed may show, if he can, that the sale-deed did not represent the real agreement between the parties; or for some other reason is of no effect. This the plaintiff was allowed an opportunity of doing, but as indicated above it has not been found that he succeeded in doing it. Therefore, I agree that the decree of the first Court must be restored.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

DAMODAR NANDRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MANUBAI, HUSBAND GOVINDRAO PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

1909.

August 24.

Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 2†
—*Agriculturist—Definition—Interpretation.*

Section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) gives two definitions of the term "agriculturist", one in clause 1 and the other in clause 2.

* Second Appal No. 692 of 1907.

† The Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2—

1st—"Agriculturist" shall be taken to mean a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which this Act may for the time being extend or who ordinarily engages personally in agricultural labour within those limits.

* * * * *

2nd.—In Chapters II, III, IV and VI, and in section 69, the term "agriculturist" where used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.

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The former applies where a party to a suit is an agriculturist at the time the suit is filed by or against him.

The second clause, which gives a special definition of the term "agriculturist" for the purposes of Chapters II, III, IV and VI and section 69 of the Act, is not exhaustive but is merely inclusive and is intended for a special purpose.

The decision in *Mahadev Narayan Lokhande v. Vinayak Gangadhar Purandhare*⁽¹⁾ does not lay down the proposition of law that a party to a suit is not entitled to the privileges of an agriculturist under the Dekkhan Agriculturists' Relief Act, 1879, if he was not an agriculturist at the time the liability in question was incurred, even though it may be that he was an agriculturist within the meaning of the first clause of section 2 at the time of the suit.

SECOND appeal from the decision of W. Baker, District Judge of Ahmednagar, confirming the decree passed by G. B. Laghate, Subordinate Judge of Shevgaon.

Suit to redeem a mortgage.

The mortgage was executed by Anandibai (mother-in-law of plaintiff) to one Kesuram (father of defendants) on the 26th March 1874.

The plaintiff alleging that the mortgagees went into possession of the property in 1875 and that the mortgage-debt was satisfied out of the profits they received, instituted this suit in 1904.

The plaintiff was an agriculturist.

The Court of first instance took an account of the dealings between the parties as provided for by the Dekkhan Agriculturists' Relief Act, 1879, and found that nothing remained due under the mortgage. The plaintiff's claim was therefore decreed.

The lower appellate Court confirmed this decree on appeal.

The defendants appealed to the High Court.

D. R. Patvardhan, for the appellants.

K. H. Kelkar, for the respondents.

CHANDAVARKAR, J.:—The lower appellate Court has found that the respondent is an agriculturist and on that footing has taken the accounts of the mortgage transactions concerned in this case. But it is contended that the finding as to the status of the respondent is erroneous in law, because the Act applies

(1) (1909) 33 Bom 504. 11 Bom. L. R. 721.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.
September 14.

VINAYAK VAMAN PARANJPE (ORIGINAL PLAINTIFF), APPELLANT, v.
ANANDA VALAD RAMJI (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), Article 179, clause 4—Decree—Execution—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed.

A decree was passed on the 12th October 1894 and an application to execute it was made by the decree-holder on the 16th August 1897. The process fee not having been paid the application was struck off. The second application to execute the decree was presented on the 16th August 1900 by the assignee of the decree-holder; but as he did not produce the assignment the application was struck off on the 27th October 1900. The third application was presented by a *mukhtyar* of the assignee on the 11th August 1903; but as neither the assignment nor the *mukhtyarnama* was produced it was struck off on the 9th October 1903. The same *mukhtyar* presented a fourth application on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code (Act XIV of 1882) and the application was disposed of, the decree-holder agreeing to accept a payment of Rs. 45 from the judgment-debtor. On the 11th December 1906, the fifth application to execute the decree was filed. The lower Courts holding that the second and third applications could not be regarded as applications for execution made in accordance with law, dismissed the fifth application as barred by the law of limitation :—

Held, that the present application was not barred, for the non-production of the *mukhtyarnama* and the assignment did not prove that they did not exist in fact.

Abdul Majid v. Muhammad Faizullah(1), followed.

SECOND appeal from the decision of F. J. Varley, District Judge of Ahmednagar, confirming the decree passed by G. B. Laghate, Subordinate Judge of Shevgaon.

Proceedings in execution.

On the 12th October 1894 a decree was passed against the defendant Chima Ramji for Rs. 200, which was made payable in four yearly instalments of Rs. 50 each.

* Second Appeal No. 46 of 1909.

(1) (1890) 13 All. 89.

The first application to execute this decree was presented by the decree-holder on the 16th August 1897. Process fee not having been paid the *darkhast* was struck off.

The decree was then assigned to the appellant, who applied to execute it on the 16th August 1900. The deed of assignment was not produced; and the application was struck off on the 27th October 1900.

The third application to execute the decree was filed on the 11th August 1903, by a *mukhtyar* of the appellant. This *darkhast* also was struck off as the assignment and the *mukhtyar-nama* was not produced.

On the 19th December 1905 the fourth application was presented. Notice was thereupon issued to the judgment-debtor under section 448 of the Civil Procedure Code of 1882. The decree-holder agreed to receive Rs. 45 from the judgment-debtor: and the application was accordingly disposed of.

On the 11th December 1906, the present application to execute the decree was filed.

The Subordinate Judge dismissed the application as barred by the law of limitation. His reasons were expressed as follows:—

We have to see whether there is any *darkhast* presented by the right party, between the second *darkhast* of 16th August 1900 and the present *darkhast* of 11th December 1906. The answer is that there is no *darkhast* presented in accordance with law, in this intervening time.

The *darkhast* of 11th August 1903 was not presented by the right party. Therefore the last preceding *darkhast*, although entertained and ordered to be proceeded with, was barred by limitation counted from the *darkhast* of 1900, in which also the right to apply does not appear to have been proved, the *darkhast* of 1903 being not one in accordance with law. If the last preceding *darkhast* is barred for the above reasons, the *darkhast* under consideration is also barred.

I therefore hold that the present application is barred by limitation under article 179 of the second schedule of the Limitation Act.

On appeal, the District Judge arrived at the same conclusion. The grounds of his decision were expressed as follows:—

The cases quoted by appellant's pleader (*Dalichand Bhudar v. Bai Shivkor*⁽¹⁾ and *Nepal Chandra Sadookhan v. Amrita Lall Sadookhan*⁽²⁾)

(1) (1890) 15 Bom. 242.

(2) (1899) 26 Cal. 888.

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presuppose that the Court was moved by an authorised person. It is admitted that no *mukhtyarpatra* was filed in the *darkhast* No. 3, and the previous assignment has not been proved under section 232, Civil Procedure Code. It is contended that it is open to the transferee to prove that he is entitled under his assignment (*Balkishen Das v. Bedmati Koer*⁽¹⁾) at any stage, but the facts in this case appear to have been materially different. If no *mukhtyarpatra* was filed in *darkhast* No. 483 of 1903, it is impossible to hold that it was an application in accordance with law. Nor has any authority been cited to show that a Court is precluded from giving effect to a defect of this nature at any time, and that it is bound to notice only the *darkhast* before it.

The plaintiff appealed to the High Court.

P. P. Khare, for the appellant:—The lower Courts have held that the second and the third applications were not made in accordance with law, simply because the assignment and the *mukhtyarnama* were not produced. In this they were wrong. See *Abdul Majid v. Muhammad Faizullah*⁽²⁾ and *Abdul Kureem v. Chukhun*⁽³⁾.

D. W. Pilgamkar, for the respondent:—The intervening applications Nos. 2 and 3 are not made in accordance with law. The deed of assignment and the *mukhtyarnama* not having been proved, the applications cannot be regarded as having been presented by a proper person. See *Balkishen Das v. Bedmati Koer*⁽¹⁾, *Hafizuddin Chowdhry v. Abdool Aziz*⁽⁴⁾; and *Chattar v. Newal Singh*⁽⁵⁾.

The case of *Abdul Majid v. Muhammad Faizullah*⁽²⁾ does not apply because here the finding of fact is that the assignment and the *mukhtyarnama* were not proved.

CHANDAVARKAR, J.:—The facts material for the purposes of the points of law raised in this second appeal are shortly these. A decree was obtained on the 12th October 1894, by the assignor of the present appellant. On the 16th August 1897 the first *darkhast* for its execution was presented by the decree-holder himself. But as the process fee was not paid, it was struck off. The second *darkhast* was presented on the 16th August 1900 by the present appellant, but it was struck off on the 27th October 1900 on the

(1) (1892) 20 Cal. 388.

(2) (1890) 13 All. 89.

(3) (1879) 5 C. L. R. 253.

(4) (1893) 20 Cal. 755.

(5) (1889) 12 All. 64.

ground that the assignment, not having been produced, was not proved. On the 11th August 1903, a person calling himself the *mukhtyar* of the assignee presented the third *darkhast*. But as neither the *mukhtyarnama* nor the deed of assignment was produced it was struck off on the 9th October 1903. The fourth *darkhast* was presented by the same *mukhtyar* on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code then in force. He not having appeared, the *darkhast* was disposed of.

Both the Courts below have held that the present *darkhast* is barred by the law of limitation, because the second and the third *darkhasts* cannot be regarded as applications for execution made in accordance with law. We cannot agree with that view. These two *darkhasts* were disallowed, not because the persons who made those applications were not competent to make them, but merely because they did not produce evidence to satisfy the Court that there was an assignment and that there was a *mukhtyarnama*. But from the non-production of these it does not follow that the assignment and the *mukhtyarnama* did not exist in fact then. It has been held in *Abul Majid v. Muhammad Faizullah*⁽¹⁾, under similar circumstances, that the application of a party for the execution of a decree is a step-in-aid of it, though he fails to produce evidence to show that he had a right to execution. See also *Abdul Kureem v. Chukhun*⁽²⁾. Neither of the lower Courts has found in the present case whether the assignee was in fact an assignee, at the date of his application and was competent to make it, nor has it decided whether the *mukhtyar* of the assignee was *mukhtyar* in fact on the 11th of August 1903 when the third *darkhast* was presented.

We, therefore, reverse the decree of the Court below and send back the *darkhast* to be dealt with according to law with reference to the observations herein. Costs to abide the result.

Decree reversed.

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(1) (1893) 13 All. 89.

(2) (1879) 5 C. L. R. 253.

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Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

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RAGHUNATHJI TARACHAND, A FIRM (APPELLANTS AND DEFENDANTS), v.
THE BANK OF BOMBAY* (RESPONDENTS AND PLAINTIFFS).

Hindu law—Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor coparcener—Liability of minor coparcener in suit on promissory notes.

One H. persuaded N. who was the only adult male member of a joint Hindu firm carrying on an ancestral trade to sign certain promissory notes in the name of his ancestral firm. N. signed the notes without the knowledge of the other member of the firm and without any advantage to the firm. The notes were subsequently endorsed by H. to B. who advanced monies on them to H.

On a suit by B. to recover the amounts due on the notes from N.'s firm K., a minor coparcener, pleaded that he was not liable.

Held, varying the decree of Heaton, J., that the minor's share in the firm was liable.

Per CHANDAVARKAR, J. :—Under Hindu law a joint family, which carries on a trade handed down from its ancestors becomes a trading family; trade being one of its *kulacharas* (duty or practice) it attracts to itself all the necessary incidents of trade.

The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family.

Where a minor is a coparcener in a joint family his share in the family property is liable for debts contracted by his managing coparcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the terms *family purpose* or *purposes incidental to it* must have given way for the expression *trading purpose* or *purpose incidental to it* having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family, trading as a firm, necessary for its existence and its purposes.

* Original Suits Nos. 60 and 90 of 1908. Appeal No. 28 of 1908.

The minor's share is therefore bound by it since it constitutes an obligation of the firm.

Per BATCHELOR, J. :—In establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. The test to be applied in cases of this kind is rather the apparent authority of the manager than the actual necessity of the family, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade.

THERE were two Summary Suits filed by the Bank of Bombay on two promissory notes or Hundis against the firm of Raghunathji Tarachand in the name of which the notes were made and by whom they were dishonoured and the heirs of the person by name Hirabhai Ghellabhai to whom or to whose order the notes were payable, who endorsed them to the Bank of Bombay and obtained money from the Bank.

The latter defendants did not appear. The first defendant obtained leave to defend and pleaded in substance that, though the notes were signed by one Narottam, the son of Gordhandas, who was the only son of the original founder of the firm Raghunath, yet that Narottam had no authority to sign with the name of the firm, and did not sign them for the firm; that the notes were signed by Narottam only when entreated by Hirabhai; that he received no consideration and did not know he was incurring any liability; that they were obtained by fraud and that the Bank through their agent had notice of the fraud.

The firm of Raghunathji Tarachand was the name of a firm belonging to a Hindu family, of which Narottam was the only adult male member. The two notes sued on were signed by Narottam in the name of the firm.

Heaton, J., found *inter alia* that the notes in question were signed by the firm of Raghunathji Tarachand; that the firm of Raghunathji Tarachand was a joint family firm; that Narottam, at the time he signed the notes, was the manager of the joint family firm; that the making of the notes was a clandestine transaction in fraud of the firm of Raghunathji Tarachand, and that the making of the notes was neither in the course of the business, nor in the interest of, nor in any way connected with

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the affairs of the firm, but that the joint family firm was liable under the notes signed by its manager.

The Court passed a decree against the firm of Raghunathji Tarachand and against the second defendant as the representative of Hirabhai Ghellabhai to the extent of the funds of Hirabhai Ghellabhai which had come to their hands.

The defendant firm of Raghunathji Tarachand appealed.

Raike (with him *Padshah*) for the appellants.

Lowndes with *Strangman*, *Advocate-General*, and *Inverarity* for the respondents.

CHANDAVARKAR, J.—The facts of this case, material for the purposes of this appeal, are undisputed and may be shortly stated:—

One Raghunathji Tarachand started a firm in Bombay in that name for carrying on business in cloth. On his death in 1902, his son Govardhindas continued the business. Govardhindas having died in March 1904, leaving his widow Parvat bai, two minor sons Narottam and Keshavlal, and five daughters, the cloth business was carried on for some time by the Munim of the firm under the orders of the widow. When Narottam came of age, he looked after the business. Narottam was a friend of one Hirabhai Ghellabhai, a pearl merchant, who had been in the habit of getting others to draw promissory notes in his favour for the purposes of his business and negotiating them. Towards the end of 1907 the friends, who had so accommodated him, having refused to give notes in that way any further, Hirabhai persuaded Narottam to sign the promissory notes now in dispute and two more in the name of his ancestral firm, Raghunathji Tarachand. Narottam signed them without the knowledge of his mother and of his Munim and without any advantage to his own firm. The notes were endorsed by Hirabhai to the Bank of Bombay, who thereupon advanced moneys to the former.

The notes having been dishonoured, the suit was brought by the Bank to recover the moneys of the two notes from the firm of Raghunathji Tarachand. The first point made before us in sup-

port of this appeal from Heaton J.'s decree is of a purely technical character. It is urged that the suit was wrongly brought against the firm Raghunathji Tarachand, and that, having regard to the Rules of this Court, it should have been filed against the individuals constituting the firm. Section 178 of the old Code of Civil Procedure, replaced by section 99 of the new Code, is a sufficient answer to the objection. It provides that no decree shall be reversed or modified in appeal for error or irregularity not affecting the merits of the case or the jurisdiction of the Court which passed the decree.

The second point urged is conceded by Mr. Lowndes, counsel for the respondent. Heaton, J., has given a decree against the firm Raghunathji Tarachand, and the result of that is a personal decree against the minor Keshavlal, who is a partner in the firm, entitling the Bank to attach and sell in satisfaction of the decree any property of the minor apart from his share in the firm. Mr. Lowndes agrees that the decree goes further than the law warrants and must be modified accordingly.

The really important question argued in this appeal is as to the liability of the minor in respect of his share in the firm. It is conceded by the learned counsel for the respondent that the notes in dispute were given by Narottam in fraud of his firm. Heaton, J., has found on the evidence that the plaintiff Bank are indorsees for value in *good faith*, and that finding is not impugned on appeal. At the same time it is clear and conceded by Mr. Lowndes that the Bank had made no inquiry as to the constitution of the firm and the purpose of the liability.

On these facts the argument for the appellant is, shortly, this: The defendant firm is not a partnership in the legal sense of the term, because it consists of the members of a joint family, governed not by the Indian Contract Act, but by the Hindu law. Those members were coparceners, who carried on an ancestral trade in the name of the family firm. Their relations whether *inter se* or with the outside world, must be regulated by the rules of Hindu law applicable to the joint family system. One of those rules is that laid down by the Judicial Committee of the Privy Council in the leading case of *Hunoomanpersaud v.*

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Mussumat Babooee Munraj Koonweree ⁽¹⁾. There it was held that no debt contracted by the managing member of a joint family, consisting among others of minor coparceners, can bind the minor members, unless it was for some family purpose, or unless at least the creditor is able to prove that on proper enquiry he honestly believed that it was for such purpose.

Applying that rule to the facts of the case, it is urged that the Bank are not entitled to a decree even against the share of the minor Keshavlal in the family firm, since the promissory notes in question were given by the other partner, Narottam, in fraud of the firm, and the Bank had made no enquiry as to the necessity for, or purpose of, the notes before becoming indorsees for value.

The reason of the rule that partners in trade have authority, as regards third persons, to bind the firm by bills of exchange or a promissory note is stated in Tudor's Selection of Leading Cases on Mercantile and Maritime Law (3rd Edn., p. 477) to be that, in the case of mercantile partnerships, the circulating of negotiable instruments is necessary. The drawing and accepting of bills and the giving of promissory notes is "part of the ordinary course of such a partnership," because, having regard to its nature, that power is essential and is incidental to its purposes: see the judgment of Cockburn, C. J., in *Nicholson v. Rickitts* ⁽²⁾. The rule has been adopted and enforced in the case of trading partnerships in the interests of trade and the necessities of commerce, and has become a rule of the trade.

It is true that neither any Smriti nor authoritative commentary on Hindu law expressly recognises any such law with reference to a joint Hindu family carrying on a trade in the capacity of a firm or to any other trading firm. But it follows, I think, from certain general principles laid down by some of the Smriti writers and their commentators that, where such a family embarks on a trade for the purposes of its livelihood, it is bound by all the rules and laws applicable to that trade.

According to Hindu lawgivers, from Manu downwards, traders formed a part of the Hindu polity, and the profession of trade was meant for the third and last of the twice-born castes, namely,

(1) (1856) 6 Moo. I. A. 393.

(2) (1860) 2 E. & E. 497 at p. 523.

Vaishyas. The Bráhmīns and the Kshatrias were allowed to trade only in case of necessity and in times of distress. There are special rules laid down for traders. Where a caste or a joint family takes to trading and that is handed down from one generation to the next and so on, it is called a trading caste or a trading family and trade becomes its duty or practice. In that case the duty or practice is called *kulachara*. The Smṛiti writers and the commentators all lay down the injunction that the king should see that *kulachara*, meaning the duty of every family or caste, is properly preserved. [See Smṛiti No. 343 of Yajñavalkya in the Acharadhya of the Mitākshara, Moghe's 3rd Edn., p. 100.]

These preliminary considerations of Hindu law must be borne in mind at the outset in the present case, because, in my opinion, they show that a joint family, which carries on a trade handed down from its ancestors, becomes a trading family; trade being one of its *kulacharas* it attracts to itself all the necessary incidents of trade. The members of such a family may indeed not be partners in the strict sense of the term because their relations *inter se* are those of coparceners. But the definition given of partnership both in the Vyavahāra Mayukha and the Mitākshara is that where several persons, such as traders, etc., carry on business jointly it is *sambhūya samu hanvīm*, i.e., partnership. Vijnaneshvara uses the same expression, *sambhūya samutthānam*, i.e., partnership, in explaining Yajñavalkya's smṛiti relating to an undivided family. The smṛiti is that "if the common stock be improved, an equal division is ordained." On this Vijnaneshvara's gloss in the Mitākshara (as translated in Stokes's Hindu Law Books) is:—"Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer." (Stokes's Hindu Law Books, page 390, s. 31.) This translation, I venture to think, does not bring out the force of the original. It ought to be as follows:—

"If the common stock of undivided brothers be collectively augmented in partnership for (the purposes of) agriculture, trade, or the like, by one of them, the partition shall be equal and a

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double share shall not be allotted to the person augmenting." The gloss shows that coparceners in a joint family become partners, when they trade in union. I say it shows that because Vijnaneshvara speaks of their union in that respect as *sārabhaya sam t'anam*, which is also the expression used in his chapter on Partnership at p. 253 of Moghe's 3rd Edn.

There is a Smṛiti of Brihaspati, according to which companies of tradesmen "should adjust their disputes according to the rules of their own profession." (Sacred Books of the East, Vol. 28, Part I p. 281, para 26). Nilakantha in his Vyavahāra Mayukha cites Bhṛigu as ordaining that "traders, cultivators of land and artisans must be made to pay" (their debts), "according to the custom of the country" (Mandlik's Translation, p. 107.) That includes mercantile usage. The same commentator cites Vyasa as laying down that "the decision of a dispute among merchants . . . is impossible to be made by others (*i.e.*, persons of other persuasions); but it should be caused to be made by those who know those pursuits" (Mandlik's Translation, p. 6.) The reason of this must be that it is merchants alone who know best what the rules of their profession, adopted in the interests of trade, are. The implication is that such rules must be followed in the interests of trade. Nowhere is it stated that these rules do not apply to a joint family carrying on a trade as its *kulachara* or family business merely because it occupies also the status of a joint family. If then our Courts have held that, in the interests of commerce, one member of a trading firm has power to bind the other members, whether they be minors or adults by means of a negotiable instrument given in the name of the firm in favour of a *bona fide* holder for value, and if that rule has become a necessary incident of that trade, or part of its mechanism, the authority of the texts above-cited supports the view that all members of the firm are bound by a promissory note given by one of them in the name of the firm.

The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose, is subject to at least one important exception. According to a text of Yajñyavalkya, "among herdsmen, vintners, dancers, washermen, and hunters,

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the husband shall pay the debts of his wife," and the reason is stated to be that "the livelihood of the family depends" upon the wife. [Maullik's Translation of the Vyavahāra Mayukha, p. 114, ll. 35 & 36] In his gloss upon this text Vijnaneshvara in the Mitākshara points out that the reason assigned in the text for this exception shows that the rule applies to similar cases. Apararka⁽¹⁾ states that this is an exception to the general rule relating to families. Balambhatta⁽²⁾ in his commentary on the Mitākshara points out that the specified cases in the text are not exhaustive but illustrative and that the principle applies to all alike—Brāhmins and others similarly situated. That is, the term 'wife' in the text stands for the *karta* or manager of the family and the terms 'herdsmen, etc.,' stand for its members carrying on a family business. From this text it follows that where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt to bind the whole family thereby, because that power is necessary for the very existence of the family. Whether the debt was contracted for the purpose of the family profession or not, it binds the members.

And this is substantially in accordance with the dictum in *Ramlal Thakurdas v. Lakhmichand Muniam* ⁽³⁾, where it was said at page 54:—A minor, who is a member of a joint Hindu family carrying on an ancestral trade as a firm, is bound by such acts as are necessarily incident to the carrying on of a trade. According to the law merchant, the drawing of a bill of exchange or the giving of a promissory note is a necessary incident of the carrying on of trade. The dictum in *Ramlal v. Lakhmichand* ⁽³⁾, strictly speaking, was not necessary for the purposes of its actual

(1) See Apararka's Yajnyavalkya Smṛiti, A'undāshvama Series, Vyavahāradhikya p 643.

(2) नंद परिगणनं किंत्पुत्रक्षणाभित्यनेनैव सूचितमित्याह यस्मादिति ॥

अन्योपि एतद्विन्नाः सर्वे ब्राह्मणादपि. [Ms Copy of Balambhatti which is in this Court.]

(3) (1861) 1 Bom. H. C. R. Appx. h,

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decision. And the decisions of the Calcutta High Court in *Johurra Bibee v. Sreegopal Misser* ⁽¹⁾ and *Bemola Dossee v. Mohun Dossee* ⁽²⁾ and *Sakrabhai v. Maganlal* ⁽³⁾, in which *Ramlal v. Lakhmichand* ⁽⁴⁾ is approved and followed, do not exactly touch the point of law arising in the present case. I should have declined to act upon the dicta in these cases had I found no support for them in the Hindu law books. I am of opinion that they correctly express the Hindu law on the subject, having regard to the texts to which I have referred in this judgment. In *Samalbhai Nathubhai v. Someshvar* ⁽⁵⁾ it has been held by this Court that a joint family carrying on business as a firm is not exclusively governed either by the principles applicable to joint families as such or by the Contract Act. It is, I think, a necessary inference from that decision that those principles will apply to such a firm only so far as they are not opposed to but are consistent with the necessary incidents of trade and the paramount interests of commerce.

We have been asked by Mr. Raikes, in his argument for the appellant, not to apply this law to the facts of this case, because the law, so far as it has been applied to partnerships formed under the Indian Contract Act or to partnerships falling within the English law, has its origin in mercantile usage but no such usage was pleaded by the respondent Bank and indeed it could not be pleaded as the suit was filed as a summary action under the rules of this Court. The answer to this contention is simple. "The law merchant, it has been observed, forms a branch of the law of England, and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them." [Broom's legal Maxims, 7th Edn., p. 705.]

Then comes the question as to the nature and extent of the liability of the minor Keshavlal. We have been referred by

(1) (1873) 1 Cal. 470.

(3) (1901) 26 Bom. 206.

(2) (1880) 5 Cal. 752.

(4) (1861) 1 Bom. H. C. R. Appx. li.

(5) (1880) 5 Bom. 38.

Mr. Raikes to the decision of the Judicial Committee of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose* ⁽¹⁾, that a minor is incapable of contracting. And he argues that section 247 of the Indian Contract Act is inapplicable here, because the minor is governed by the principles of Hindu law.

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Assuming that it is so, what is the Hindu law on the subject? Where a minor is a coparcener in a joint family, his *share* in the family property is liable for debts contracted by his managing coparcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose* or *purposes incidental to it* must here give way to the expression *trading purpose* or *purpose incidental to it*, having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family trading as a firm, necessary for its existence and its purposes. It is a necessary incident of the carrying on of the trade. Without it the firm could not gain credit in the market and prosper. The minor's share is, therefore, bound by it, since it constitutes an obligation of the firm. This conclusion arises, in my opinion, from the principles of Hindu law with which I have dealt in the earlier part of this judgment. It is unnecessary, therefore, to invoke the aid of either section 247 or any other provision of the Indian Contract Act.

For these reasons I am of opinion that the conclusion of law arrived at by Heatón, J., is correct. His decree, however, goes further than the law warrants and must be modified by striking out the words "against the firm of Raghunathji Tarachand", and substituting for them the words:—"Against the share of the minor defendant Keshavlal in the firm of Raghunathji Tarachand." In other respects the decree must be confirmed. As to costs, the variation we have made in the decree appealed from appears substantial but in name. It is admitted by Mr. Raikes that the minor has no property of his own. The respondents understood the decree to apply only to the minor's share, and when the appeal was opened, their counsel at once

(1) (1902) L. R. 30 I. A. 114.

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conceded the point as to the personal liability of the minor. The argument in appeal was confined to the minor's share in the firm and on that point the appeal fails. The decree must, therefore, be confirmed with costs.

BACHELOR, J.:—This appeal raises a question of the liability of the appellants in respect of two promissory notes executed by one Narottam Gordhan in favour of one Hirabhai Ghellabhai, who indorsed them over to the Bank of Bombay and received the money for them from the Bank. The facts necessary for the decision of the appeal are either admitted or are found and not contested. Narottam was the adult manager of a joint Hindu family, the only other coparcener being his brother, Keshavlal, an infant, now about four years of age. Among the assets of the undivided family was a joint firm trading in the name of Raghunathji Tarachand, who was the grandfather of Narottam and the original founder of the business. The promissory notes in suit were executed by Narottam in the name of the firm, Raghunathji Tarachand, but no consideration passed from Hirabhai Ghellabhai. Hirabhai was a friend of Narottam, who executed the notes on the faith of the mere assurance by Hirabhai that he would not be called upon to pay. In fact Hirabhai was unable to meet the notes and appears to have committed suicide. The notes were dishonoured, and the respondents, who are holders for value without notice of any fraud, seek to come upon the firm Raghunathji Tarachand, including the minor Keshavlal's share therein. The only material question for decision is whether the minor's share in the firm is liable. It is admitted by Mr. Raikes that Narottam is liable, and it is admitted by Mr. Lowndes that the decree under appeal cannot be sustained in so far as, being a decree against the firm, it would be enforceable against the minor personally.

With regard to Mr. Raikes's preliminary objection to the frame of the suit, I agree with my learned colleague that a sufficient answer to it is supplied by section 578 of the Civil Procedure Code of 1882; section 99 of the present Code is to the same effect.

This brings me to the principal question whether the minor's share in the firm is liable on the obligations undertaken by

Narottam in the name of the firm. Mr. Lowndes has invited us to decide the question on the principles of the law merchant, and has urged in forcible language that the reversal of the decree would have the effect of paralysing a very important branch of trade throughout the length and breadth of the Presidency. But these considerations, though undoubtedly of great consequence in their proper place, do not, I think, assist a Court of Justice. It is our business to ascertain and declare what the law is; we have no concern with what it ought to be in reference to one standard or another. The law here and now actually is one way or the other: if it is in favour of the decree made, well and good: but if it is not, a Court cannot, I think, make it the law by showing that it would be for the convenience of merchants to have it so. As I understand the matter, no degree of commercial convenience can convert bad law into good. It is of course a satisfaction to a judge to find that the law, as he ascertains it to be, meets the requirements of an important class of the community; but further than that I do not see how the argument *ab inconvenienti* can properly be pressed. It may be observed, moreover, that here in India we are governed by our Codes, which are subjected to fairly frequent amendment whenever amendment is considered to be required; so that there should be the less temptation to judges to encroach upon the province of the legislature. And I am aware of no authority for supposing that, side by side with the recognised law, there exists in India today a separate set of valid, but somewhat undefined legal principles describable as the law merchant. I should rather suppose that those portions of the law merchant which the Indian legislature has seen fit to accept are to be found embodied in such provisions of that legislature as the Contract Act and the Negotiable Instruments Act; and that it is not competent to us to leave this firm ground and explore the uncertain regions which are imperfectly defined by the phrase, the law merchant. Some reliance was placed by Mr. Lowndes on *Goddwin v. Robar's* ⁽¹⁾, where Cockburn C. J., lays down that the law merchant is not fixed and stereotyped, but is capable of being

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(1) (1875) L. R. 10 Ex. 337 at p. 346.

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expanded and enlarged so as to meet the requirements of trade in the varying circumstances of commerce. But in the same sentence the Chief Justice explains that this expansion is effected by the usages of merchants being duly proved and so becoming ratified by the decisions of Courts of law; and he refers to the dictum of Lord Campbell in *Brandao v. Barnett* ⁽¹⁾, that "when a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which Courts of Justice are bound to know and recognise." In this case no such usage was even pleaded, and the argument presupposes that, in the entire absence of evidence, we should pronounce, presumably of our own knowledge, that the interests of commerce require the rule of law to be in the respondent's favour and against the Hindu minor. Speaking for myself, I can only say that I have no such knowledge. There would of course have been no difficulty in giving effect to the alleged usage if it had been properly pleaded and proved, but since that was not done, I am of opinion that if the decree is to be affirmed, it must be affirmed by reference simply to the accepted principles of law, as the law has hitherto been understood in this part of India. That of course will still leave it open to us to refer for guidance to English decisions where they are properly applicable, but I do not think that we can, by a stroke of the pen, apply a principle of English law to a minor member of a Hindu joint family. Finally, on this part of the case, I am inclined to think that the liability of the innocent co-partner depends rather upon the general principles of agency than upon anything peculiar to the law merchant.

As the learned Judge below has pointed out, then, the problem is not to be solved merely on the authority of the law in England as to the liability of an infant partner, for the members of this joint Hindu firm are, in strictness, certainly not mere partners in the sense known to English law. The firm is not strictly a partnership, but is one of the assets of an undivided Hindu family in which Narottam and the infant are coparceners. On the other hand the analogy between such a joint firm in its

(1) (1846) 12 Cl. & F. 787 at p. 805.

relations with the outer world and an ordinary partnership is in many respects extremely close. It becomes necessary, therefore, to consider how the Courts have in the past dealt with these joint firms, and to what extent they have been taken out of the sphere of ordinary Hindu law and brought within the operation of the law of partnership. The leading decision on the subject is Sausse C. J.'s judgment in *Ramlal v. Lakhmichand* ⁽¹⁾, which has admittedly been accepted as good law ever since 1861. There the learned Chief Justice in discussing the question "to what extent a minor member of an undivided Hindu family will be held bound by the acts of the family manager with reference to an ancestral family trade" lays it down that "in carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager... which are necessarily incident to and flowing out of *the carrying on* of that trade... The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bonâ fide* trade dealings, should not be held bound to investigate the *status* of the family represented by the manager whilst dealing with him on the credit of the family property." And he goes on to point out that in the interests of the joint family itself, with which otherwise third parties would be unwilling to take the risk of dealing, it is necessary thus far to trench upon the protection which the Hindu law generally extends to the interests of a minor. This decision was followed in *Johurra Bibee v. Sreegopal Misser* ⁽²⁾, where Pontifex, J., says that persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business. Then there is the case of *Joykisto Couar v. Nittyanund Nundy* ⁽³⁾, decided by Garth, C. J., and two other judges. The judgment was pronounced by Sir Richard Garth who after citing the provisions of section 247 of the Contract Act observes that "on principle there ought not to be

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(1) (1861) 1 Bom. H. C. R. App., li at pp. lxx, lxxii. (2) (1876) 1 Cal. 470.

(3) (1878) 3 Cal. 738.

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any difference between the nature of the liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager." This was quoted with approval in this Court in the Full Bench case of *Sakrabhai v. Maganlal* ⁽¹⁾, where Jenkins, C. J., also affirms the following extract from *Bemola Dossee v. Mohun Dossee* ⁽²⁾:—"In this case Gour Churn certainly had an implied power to borrow on the credit of the joint family as partners in the firm; also we think, he had power to borrow on the credit of the joint family, as a joint family for the purposes of the firm. A joint family carrying on a business is necessarily a peculiar kind of partnership." I need not pursue the cases further: enough has been cited to show that in establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. Section 247 of the Contract Act appears to me to furnish distinct authority for this view, which so far as I can gather, is not in conflict with any text of the Hindu law dealing specifically with the legal position of an ancestral firm in its dealings with the outside world of commerce. It follows, I think, that the test to be applied in such cases is rather the apparent authority of the manager than the actual necessity of the family. And that to my mind is a perfectly reasonable position, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade. If this reasoning is right, we have taken what appears to me to be the really important step in the case, that is, the step from the ordinary Hindu law as to a manager's power of alienation to the law of partnership, and, that step taken, the decision of the appeal does not seem to present much difficulty. The law of partnership is laid down in the Contract Act, and for any further elucidation of its principles we are justified in referring—indeed counsel for appellant has insistently referred—to decisions of the Courts in England. The central facts are that the Bank had no knowledge of any fraud; that Narottam, who signed in the firm's name, had in fact authority to do so; and that

(1) (1901) 26 Bom. 206 at p. 213.

(2) (1880) 5 Cal. 792 at p. 804.

the execution of such notes is an act necessary for, or usually done in the conduct of such a trade as the family here was carrying on. Therefore, under section 251 of the Contract Act, I am of opinion that Narottam bound the firm; and that, as Heaton, J., has pointed out, would be the law in England. If, then, the firm as a firm is bound, is Keshavlal's share in the firm exempt from liability because Keshavlal is an infant? In England, if the proper steps in procedure are taken, the infant's share becomes available for the benefit of the creditors: see *Lovell & Christmas v. Beauchamp*⁽¹⁾. But here occurs a difficulty which was urged upon us with much force by Mr. Raikes: in England a minor's contract is merely voidable at his election on attaining full age, whereas in India a minor's contract is void. That was laid down by their Lordships of the Privy Council in *Mohori Bibee v. Dhurmodas Ghose*⁽²⁾, and the cases of *Joykisto Cowar v. Nittyanund Nundy*⁽³⁾ and *Rampartab v. Foolibai*⁽⁴⁾ were decided before it was settled that a minor was incompetent to contract, and while the general current of Indian decisions was in favour of holding such contract only voidable. But the answer appears to me to be that the statutory provision contained in section 247 of the Contract Act, which after declaring that the minor shall not be personally liable, goes on, "but the share of such minor in the property of the firm is liable for the obligation of the firm." I apprehend, therefore, that when once an obligation is held to attach to the firm, the minor's share in the firm must necessarily be liable. It may be by a plausible conjecture, as suggested by Sir Frederick Pollock and Mr. Mulla in their edition of the Contract Act, that in framing section 247 the draftsman had either overlooked section 11 or had taken the earlier, but now impossible, view of it, namely that a minor's contract was merely voidable; but, however that may be, these are the words of the statute, which, as I understand them, are not the less imperative by reason of the now established interpretation of section 11. If this were a suit by the minor against the other members of the firm, say for an account, I can understand that some difficulty might be caused by the circumstance that under section 11 the

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(1) [1894] A. C. 607.

(2) (1878) 3 Cal. 733.

(3) (1902) L. R. 30 I. A. 114,

(4) (1896) 20 Bom. 767.

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minor is not now competent to contract ; but I am unable to see how, in a suit like the present, this construction of section 11 can destroy the force of section 247. Though Keshavlal is a minor, and as such not competent to contract, yet for the reasons already given, I think that the liability of his share is a question to be determined by the law of partnership, and it is in the Contract Act that that law is contained.

On these grounds I agree with the learned judge below that the minor's share is liable to the Bank. It is urged that this is a harsh conclusion, but considerations of that nature do not seem to me appropriate in such a case as this where unfortunately either one innocent party or another must suffer for the misconduct of a third.

For these reasons I agree that the decree should be affirmed subject to the slight variation not contested, and that this appeal should be dismissed with costs.

Decree confirmed.

Attorneys for the appellant : Messrs. *Payne & Co.*

Attorneys for the respondents : Messrs. *Crawford, Brown & Co.*

B. N. L.

CRIMINAL REVISION.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

EMPEROR v NAGJI GHELABHAI *

Criminal Procedure Code (Act V of 1898), sections 195, 478—Sanction to prosecute—Subsequent order to prosecute passed under section 478.

The grant of a sanction to prosecute to a private individual under section 195 of the Criminal Procedure Code, 1898, is no bar to the subsequent institution of proceedings by the Civil Court itself under section 478 of the Code.

Queen-Empress v. Shankar⁽¹⁾, followed.

THIS was an application to revise an order passed by Devdat D., Second Class Magistrate of Pardi.

* Criminal Application for Revision No. 144 of 1909.

(1) (1888) 13 Bom. 384.

The petitioner Nagji Ghelabhai and another preferred a complaint against Khandu Malhari and five others charging them with theft or in the alternative with criminal breach of trust. The Second Class Magistrate of Pardi inquired into the case and discharged the accused under section 253 of the Criminal Procedure Code, 1898.

One of the accused, Khandu Malhari, thereafter applied for sanction to prosecute the complainants under section 195 of the Criminal Procedure Code, 1898. This application was granted.

Another of the accused, Dala Sidhu, also applied for and obtained sanction to prosecute the complainants, for offences under sections 211, 193, 196 and 463 of the Indian Penal Code, 1860.

Some time after this, a clerk in the Second Class Magistrate's Court at Pardi filed an information against the same complainants in the Court of the First Class Magistrate at Bulsar, charging them under sections 182, 211, 193, 195, 196, 465, 471 and 109 of the Indian Penal Code, 1860, with reference to the same matter. The clerk also produced an order sanctioning the prosecution.

The Magistrate entertained the complaint, and put the petitioners on their trial.

The petitioners applied to the High Court.

H. C. Coyajee (with *K. M. Talayarkhan*), for the petitioners:—We submit that the Magistrate having once granted sanction to Khandu Malhari, was not competent to grant any more sanctions to others with reference to the same matter. The Magistrate is not even at liberty to extend the time of a sanction which he has once granted; much less can he give a subsequent sanction to the same or any other man.

G. S. Rao, Acting Government Pleader, for the Crown:—The first sanction here is granted under section 195 of the Criminal Procedure Code, 1898. It does not restrict the Magistrate's power to direct prosecution of the same persons under section 478 of the Code. See *Queen-Empress v. Shankar*⁽¹⁾.

(1) (1888) 13 Bom. 384.

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SCOTT, C. J.:—On the 31st of October 1908 the Second Class Magistrate of Párdi granted sanction to two accused persons in a theft case to prosecute the complainants for the offences mentioned in section 195 of the Criminal Procedure Code. No action was taken upon that sanction, but in the December following a complaint was lodged in the Court of the nearest Magistrate, First Class, by the Kárkun of the Second Class Magistrate of Párdi who stated to the Court that he knew the accused who were the complainants in the theft case and that he had lodged the complaint by order of the Second Class Magistrate, that it was a verbal order, that he was given the sanction order and the papers in the case of the complaint of the accused Nagji Ghelabhai and that he produced the Second Class Magistrate's sanction. Thereupon the accused was arrested and put on his trial.

An application has now been made to us to quash the proceedings on the ground that they have been instituted under an illegal sanction. The argument is that section 195 of the Criminal Procedure Code only contemplates one sanction for prosecution by a private individual, and it does not contemplate a new sanction to a private individual being given, because, that would be an evasion of the proviso to section 195 (6) which in effect provides that the term of a sanction shall not be extended except by the High Court.

The learned Government Pleader, however, has pointed out to us the evidence of the clerk of the Second Class Magistrate to which we have alluded and we think that having regard to that evidence we ought to accept the Government Pleader's argument that the proceedings which are now going on before the First Class Magistrate are proceedings instituted under section 476 by the Court itself.

The Kárkun who instituted those proceedings is an officer of that Court and has no personal interest in prosecuting the accused persons.

It has been held by this Court in the case of *Queen-Empress v. Shankar*⁽¹⁾ that the existence of a previous sanction under section 195 of the Criminal Procedure Code is no bar to the institution of proceedings by the Civil Court itself under section

⁽¹⁾ (1888) 13 Bom. 384.

478 and, we think, that is an authority for the view which we take in this case that the sanction of the 31st October to the private individuals is no bar to the proceedings which are now being taken at the instance of the Second Class Magistrate by his Kárkun.

We, therefore, reject the application.

Application rejected.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

NARSINH AND OTHERS (ORIGINAL DEFENDANTS 1a, 1b AND 1c), APPELLANTS,
v. VAMAN VENKATRAO AND OTHERS (ORIGINAL PLAINTIFFS 1—3 AND
DEFENDANTS 2—5), RESPONDENTS.*

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July 27.

Limitation Act (XV of 1877), sections 22, 28—Civil Procedure Code (Act XIV of 1882), section 31—Civil Procedure Code (Act V of 1908), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiffs' claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decree.

Certain lands attached to a vatan belonged jointly to two brothers V. and D. In the year 1872 the lands were let by V. under a perpetual lease which was attested by D. D. pre-deceased V. In the year 1905 within twelve years from the death of V., his representatives brought a suit for the recovery of the lands let by V. They sought to recover the entire lands on the ground of eldership. The suit was brought against defendants 1a, 1b and 1c as the heirs of the mortgagee of the lessee (the original 1st defendant), against defendants 2 and 3 as the heirs of the lessee and against defendants 4 and 5 as the heirs of D. The heirs of defendant 1 and defendants 2 and 3 defended the suit on the ground, *inter alia*, of limitation, the suit not having been brought within twelve years from the date of the lease. Defendants 4 and 5 did not contest the plaintiffs' claim. The first Court allowed the plaintiffs' claim to the extent of their share, namely, a moiety on the ground that their claim to that extent

* Second Appeal No. 248 of 1908.

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was not time-barred. On appeal by the plaintiffs and defendants 4 and 5 the latter of whom in appeal claimed their share, namely, the other moiety, the appellate Court awarded the other moiety to defendants 4 and 5.

On second appeal by the heirs of the mortgagees,

Held, affirming the decree that the whole claim was within time. A vatan-dar is entitled to alienate vatan lands for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

Where a lease of vatan property is effected by one joint owner with the consent of the other joint owner, the time for the recovery of the vatan property from the lessee runs from the date of the death of the survivor of the joint lessors.

Defendants 4 and 5 having sought to recover in appeal their share which they had not asked for in the first Court.

Held, allowing their claim that they being parties to the suit instituted within the twelve years during which the right to a share in the vatan property could be effectually determined, the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit.

A party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act (XV of 1877) apply.

Nagendrabala Debya v. Tarapada Acharjee(1), concurred in.

Plaint and decree of the lower appellate Court amended by entering defendants 4 and 5 as co-plaintiffs.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, with appellate powers, amending the decree of H. V. Chinmulgund, Subordinate Judge of Chikodi.

The facts were as follows :—

The lands in dispute were attached to a Deshpande vatan which belonged to one Raghupat who died leaving him surviving two sons, Venkatrao and Dashrath, of whom Venkatrao was the elder. In the year 1872 Venkatrao leased the lands perpetually to one Annarao Herlekar, father of defendants 2 and 3. The lease was attested by Dashrath. Annarao in the year 1881 mortgaged his right as lessee of the lands to one Krishnarao

(1) (1908) 35 Cal. 1065.

Balaji, defendant 1. Dashrath died in the year 1876 leaving him surviving two sons Abaji and Narayan, defendants 4 and 5. Venkatrao died in the year 1893 leaving behind two sons Vaman and Vishnu and a grandson Damodar Sitaram as his heirs and legal representatives. In the year 1905, that is, within twelve years from the date of Venkatrao's death, his three representatives brought the present suit to recover possession of the lands against Krishnarao Balaji, the mortgagee of the lessee Annarao, defendant 1, and he having died his sons and heirs Narsinh, Pampa *alias* Shriniwas and Sudam *alias* Raghunath were brought on the record as defendants 1a, 1b and 1c, respectively, against the heirs of the lessee, defendants 2 and 3, and against their cousins, the sons of Dashrath, defendants 4 and 5. The plaintiffs alleged that as they were the representatives of the elder branch of the vatandar family the entire lands belonged to them by right of eldership and that their father Venkatrao had no right under the Vatan Act to alienate to strangers beyond his life-time.

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Defendant 1 contended that the lands were not kept with the plaintiffs in right of eldership and plaintiffs were not the representatives of the elder branch, that Annarao having rendered valuable service to the plaintiffs' family, the lands were given to him in gift in lieu of remuneration long before the lease of 1872, that such a gift could not be retracted and was out of the pale of the Vatan Act, that the claim was time-barred, that though defendants 4 and 5 were members of the undivided family represented by them and the plaintiffs, they were joined as co-defendants notwithstanding the fact that their claim also was time-barred and that even if the plaintiffs succeeded in establishing their claim they could not recover possession without redeeming the defendants' mortgage on payment of Rs. 1,000.

Defendants 2 and 3 answered that the claim was time-barred, that the Vatan Act was not applicable to the lands in suit and that they had no interest in the lands and were unnecessarily sued.

Defendant 4 admitted the claim and stated that he might be joined as plaintiff if necessary.

Defendant 5 was absent,

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The Subordinate Judge found that the plaintiffs were not entitled to the entire lands by right of eldership but were entitled to a moiety, that the lands in suit were vatan governed by the Vatan Act, that the perpetual lease passed by Venkat-rao to Annarao was not binding on the plaintiffs, that defendant 1 failed to show that because the claim was time-barred against the shares of defendants 4 and 5, the plaintiffs' claim was also time-barred and that the plaintiffs were entitled to recover by partition a moiety of each of the lands in suit and to get subsequent mesne profits. He, therefore, passed a decree directing the plaintiffs to recover by partition a moiety of each of the lands from defendants 1a, 1b and 1c, heirs of defendant 1.

On appeal by the plaintiffs, defendants 4 and 5 joined them in the appeal contending that the first Court was wrong in supposing that their claim was time-barred and it should have awarded to them the other moiety of the lands which it refused to restore to the plaintiffs. The appellate Court found that the moiety of the lands which was not awarded to the plaintiffs could be decreed to the appellants, defendants 4 and 5. It therefore amended the decree of the first Court and directed that the plaintiffs should recover from defendants 1a, 1b and 1c, heirs of defendant 1, half of the lands in dispute with mesne profits from date of suit and that defendants 4 and 5 should similarly recover the other half. With respect to the claim of defendants 4 and 5 the Court made the following remarks :—

The lower Court assumes that the claim of defendants 4 and 5 is time-barred, and it is urged in appeal that the claim is barred as it was not brought within 12 years of the death of the father of defendants 4 and 5. This view is erroneous. Plaintiffs and defendants 4 and 5 were undivided until recently and their parents were undivided. That having been so, defendants 4 and 5 could not until partition, say that certain lands belonged to themselves exclusively. The father of plaintiffs was the head of the undivided family and alienations made by him were to be respected till his death or till separation of defendants 4 and 5. The suit was brought within time from the death of the father (plaintiffs) and hence it is in time. Defendants 4 and 5 have been parties all along, so that it is not a case of adding parties. For these reasons I hold that the claim of defendants 4 and 5 is in time.

Defendants 1a, 1b and 1c, sons and heirs of defendant 1, preferred a second appeal.

C. A. Rele for the appellants (defendants 1a, 1b and 1c) :—The permanent lease, Exhibit 43, passed by Venkatrao in 1872 recites that the lands were held by the lessee from generation to generation. So it was a formal recognition of a perpetual tenancy which had been in existence prior to Regulation XVI of 1827. Therefore under section 83 of the Land Revenue Code, we are entitled to remain in possession as the assignees of the permanent tenant.

The Judge in appeal made out a new case for the respondents, defendants 4 and 5. They claimed the moiety for the first time in appeal. Their claim was inconsistent with their pleading and should not have been allowed : *Mylapore Iyasawmy v. Yeo Kay*⁽¹⁾, *Eshenchunder Singh v. Shamachurn Bhutto*⁽²⁾.

It was wrong to treat the suit as one for partition. It was a suit in ejectment. Defendants 4 and 5 did not claim any share. On the contrary they admitted the plaintiff's claim to the entire lands and stated that they had no share in them. In his deposition defendant 4 admitted that he had no desire to be made a plaintiff and that he had no right to the lands. Therefore defendants 4 and 5 were not in the position of plaintiffs : *Shivmurteppa v. Virappa*⁽³⁾, *Lakshman v. Narayan*⁽⁴⁾.

Dashrath, the father of defendants 4 and 5, had attested the permanent lease and it also appears that he had knowledge of its contents. Therefore time began to run against them in 1876 when Dashrath died and their claim for a moiety is, therefore, time-barred. Even assuming that time did not run against them till Venkatrao's death in 1893, their claim for a moiety, which claim they made for the first time in appeal, was clearly time-barred as it was made more than twelve years after Venkatrao's death. Section 28 of the Limitation Act, therefore, applies.

No application was made to the Court for making defendants 4 and 5 co-plaintiffs and no amendment of the record was made.

S. S. Patkar for the respondents (plaintiffs 1—3 and defendants 2—5) :—The question as to when the tenancy commenced is a question of fact and the finding recorded by the lower Court on that point against the appellants is binding in second appeal.

(1) (1887) 14 Cal. 801.

(2) (1886) 11 Moo. I. A. 7.

(3) (1899) 24 Bom. 128.

(4) (1899) 24 Bom. 182.

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Defendants 4 and 5 have been parties from the commencement of the suit and the Court in appeal was right in treating them as co-plaintiffs and in awarding them a moiety. Under section 32, paragraph 2, of the old Civil Procedure Code (Act XIV of 1882) the Court was empowered to make them co-plaintiffs. Section 22 of the Limitation Act does not apply to such a case : *Nagendrabala Debya v. Tarapada Acharjee*⁽¹⁾.

Limitation did not run against defendants 4 and 5 from the time of Dashrath's death. The lease passed by Venkatrao with respect to the vatan property was good during his life-time : *Appaji Bapuji v. Keshav Shamrao*⁽²⁾. Sections 28 of the Limitation Act does not apply as defendants 4 and 5 were parties to the suit from the commencement and were in the position of plaintiffs.

The record can be amended here and defendants 4 and 5 can be made plaintiffs : sections 99 and 151 of the new Civil Procedure Code (Act V of 1908).

C. A. Rele in reply :—The ruling in *Nagendrabala Debya v. Tarapada*⁽³⁾ is distinguishable. There the plaintiff had claimed only his share and had made his co-sharer a defendant because he had refused to join as plaintiff. The decision in *Krishna v. Mekamperuma*⁽⁴⁾ applies.

SCOTT, C. J.:—The plaintiffs who are the sons of one Venkatrao sued the first three defendants for possession of certain vatan land which they alleged had been leased by their father Venkatrao by a lease dated 1872 which was operative only for the period of his life. The plaintiffs were, at the date of the suit, joint with their cousins the sons of Dashrath, Venkatrao's brother, who with Venkatrao had been a joint vatandar of the Deshpande vatan to which the property in suit was attached.

The first three defendants contended that the lease of 1872 was merely a formal recognition of a perpetual tenancy which had been in existence prior to the date of the Vatan Regulation of 1827 and that therefore they were entitled to remain in possession as permanent tenants.

⁽¹⁾ (1908) 35 Cal. 1065.

⁽²⁾ (1890) 15 Bom. 13.

⁽³⁾ (1908) 35 Cal. 1065.

⁽⁴⁾ (1886) 10 Mad. 44.

This argument rested on an allegation of fact which was held by the lower appellate Court to be not proved. This is sufficient in special appeal to dispose of the argument.

We will now discuss the points of law which have been urged. In the original Court the plaintiffs obtained a decree for a moiety only of the property in suit, on the footing that that was all they were entitled to as representing the branch of Venkatrao.

An appeal was preferred against that decision in which the 4th and 5th defendants, sons of Dashrath, joined with the plaintiffs in urging that the decree should have been passed against the first three defendants for the whole of the property in suit. The fourth ground of appeal was that the lower Court should have awarded to defendants 4 and 5 the half of the lands that it refused to restore to the plaintiffs. This contention was successful in appeal. The lower appellate Court in delivering judgment said: "the lower Court assumes that the claim of defendants 4 and 5 is time-barred, and it is urged in appeal that the claim is barred as it was not brought within twelve years of the death of the father of defendants 4 and 5. This view is erroneous, plaintiffs and defendants 4 and 5 were undivided until recently and their parents were undivided; that having been so, defendants 4 and 5 could not, until effecting a partition, say that certain lands belonged to themselves exclusively. The father of plaintiffs was the head of the undivided family and alienations made by him were to be respected till his death or till separation of defendants 4 and 5. The suit was brought within time from the death of the plaintiffs' father and hence it is in time. Defendants 4 and 5 have been parties all along, so that it is not a case of adding parties." For these reasons the decree of the lower Court was amended by a direction that the defendants 4 and 5 should recover their moiety of the property from the defendants 1 to 3.

It has been argued on behalf of the defendants 1 to 3 that this suit is altogether barred because time ran against the plaintiffs and the 4th and 5th defendants from the date of

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the lease by Vankatrao to the defendants 1 to 3. This, however, is not the law because the property in suit is vatan property which was the subject of the Gordon Settlement of 1864, and it has been laid down by this Court in the case of *Appaji Bapuji v. Keshav Shamray*⁽¹⁾ that "the Gordon Settlement of 1864 was not intended by either party to those settlements to convert the *vatan* lands into the private property of the *vatandar* with the necessary incident of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of services, remained intact, as shown by the definition of 'hereditary office' in the declaratory Act III of 1874." The fact that vatan land is attached to the office, deprives it of some of the incidents which would attach to it if it were ordinary land in the possession of a Hindu family. Thus it results from its attachment to the office, according to the decisions of this Court which are recognised in section 5 of the Vatan Act that the *vatandar* is entitled to alienate the land for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

In the present case the lease was effected with the consent of Dashrath indicated by his signature as an attesting witness, and time would not run against the sons either of Venkatrao or of Dashrath until the expiry of the lives of those two persons. Therefore time for the purposes of this suit will run from the date of the death of Venkatrao, the survivor of the two *vatan*-dars. That took place on the 26th of April 1893, and the suit was filed within the period of 12 years, time being allowed for the expiry of the summer vacation of the Court which was in progress on the 25th April 1905.

Then it is said that at least the 4th and 5th defendants are not entitled to any relief in this suit. They have not joined the plaintiffs in suing for possession of the property. They have in fact put forward a case that the persons entitled to the property are the plaintiffs and not themselves. They were not entitled in appeal to come forward with a different case and to

⁽¹⁾ (1890) 15 Bom. 12.

ask for a moiety of the property, that they had not asked for in the first instance.

Now the case for the 4th and 5th defendants in the first Court was that there had been a partition between them and the plaintiffs, and that at that partition the plaintiffs on the ground of the eldership of their father Venkatrao had been awarded the whole of this vatan property.

The first Court held that the documents relating to this partition not being forthcoming this allegation of the assignment to the plaintiffs by way of eldership was not substantiated, and accordingly, allowed to the plaintiffs only a moiety of the property.

We do not think that the Judge of the appellate Court was in error in allowing the 4th and 5th defendants, after the failure of proof of their case with regard to partition, to fall back upon the necessary alternative that there having been no partition they were entitled to a moiety in right of their father Dashrath, and the only question which could arise, if that point of procedure were decided in their favour, would be whether their claim was barred by the law of limitation.

We have already held that time only began to run from the death of Venkatrao in 1893, and there can be no question that the 4th and 5th defendants were upon the record of this suit as defendants at the date of its institution. Is there then anything in the law of limitation which prevents them from obtaining relief in respect of their share of the property? Section 28 of the India Limitation Act provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property, shall be extinguished." It is necessary in order to give effect to this section to supply certain implied conditions; for instance, it would be a condition that the section would operate if the person did not bring a suit within the period prescribed. But would his right be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined? The section does not say so, and we do not think

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that we ought to construe it as implying that this would be the case. Here the defendants were parties to the suit instituted within twelve years in which their rights to a share in this vatan property could be effectually determined as against the defendants 1 to 3, and the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit; see section 31 of the Civil Procedure Code of 1882 and Order I, Rule 9 of the Code of 1908. There can be no doubt that if the defendants had been plaintiffs in the first instance no such argument as we have been discussing could have been put forward. But it appears from the judgment of the learned Judge of the appellate Court that he, for the purposes of the suit, treated them as co-plaintiffs although he did not amend the record by placing them among the plaintiffs and striking them out from among the defendants.

It has been held in Calcutta in the case of *Nagendrabala Debba v. Tarapada Acharjee*⁽¹⁾, that a party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act apply. In that conclusion we concur. We think that we should exercise our powers of amendment by putting the plaint in the shape in which the learned Judge of the lower appellate Court intended it to be at the time he delivered his judgment.

We direct that the 4th and 5th defendants be entered in the plaint and the decree in the lower appellate Court as co-plaintiffs instead of defendants, this being consented to by their pleader. In other respects we affirm the decree of the lower Court and dismiss this appeal with costs.

Decree amended and affirmed.

G. B. R.

(1) (1908) 35 Cal. 1065.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice.

AHIMKHAN VALAD HYDERKHAN (ORIGINAL PLAINTIFF), APPELLANT,
v. DADAMIYA VALAD HYDERKHAN AND ANOTHER (ORIGINAL DEFEND-
ANTS), RESPONDENTS *

1909.

August 2.

Hereditary Offices Act (Bom. Act III of 1874), sections 25, 36(1)—Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.

Section 25 of the Hereditary Offices Act (Bom. Act III of 1874) imposes the duty upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is maintainable under section 36 of the Act notwithstanding that it is manifest that the declaration is sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

The plaintiff sued for a declaration that he was the eldest son of Hyderkhan deceased, that the deceased who died about 2½ years before the institution of the suit was Vatandar Police Patil of Mouze Makhmalabad and owned an eight annas share in the Vatan and had his name entered in the Government books as such, that though the plaintiff was the eldest son, a dispute

* Second Appeal No. 10 of 1909.

(1) Sections 25 and 36 of the Hereditary Offices Act (Bom. Act III of 1874) run as follows :—

25. It shall be the duty of the Collector to determine, as hereinafter provided, the custom of the Vatan as to service and what persons shall be recognized as representative Vatandars for the purpose of this Act, and to register their names.

36. When any representative Vatandar dies, it shall be the duty of the Patil and village-accountant to report the fact to the Collector; and the Collector shall, if satisfied of the truth of the report, register the name of the eldest son or other person appearing to be nearest heir of such Vatandar as representative Vatandar in place of the Vatandar so deceased. A certificate of heirship or a decree of a competent Court shall, until revoked or set aside, be conclusive proof of the facts stated or determined in such certificate or decree.

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having arisen as to seniority between him and his two brothers, defendants 1 and 2, the Assistant Collector ruled on the 11th October 1906 that defendant 1 was the senior of the three, that the Collector, on appeal by the plaintiff, confirmed the order of the Assistant Collector on the 10th September 1906, that the said orders of the Revenue Department had prejudiced the plaintiff's right of *vadilki* (eldership) and that the plaintiff's name could not be entered in the Vatan Register as Vatandar Patil unless and until he established his right as the eldest son and obtained a declaration to that effect from the Civil Court. It was further urged that though the Revenue Authorities were competent to appoint or select any one of the descendents of the Vatandar Police Patil's family for the office and enter the Vatan on his name, still that circumstance did not oust the jurisdiction of the Civil Court to determine which of the members of the Vatandar family was the senior and that the plaintiff was officiating as Vatandar at the time of the suit and was deputed to the office by Hyderkhan during his life-time. The suit was filed on the 20th February 1907.

The defendants answered that defendant 1 was Hyderkhan's eldest son and not the plaintiff, that the right to determine which member of a Vatandar's family was *vadil* or senior belonged to the Revenue Department only, that the claim was not cognizable by the Civil Court and that it was time-barred.

The Subordinate Judge found that the suit for the relief claimed was not cognizable by the Civil Court and that the plaintiff was not entitled to any relief. He, therefore, dismissed the suit relying on the decision in *Raoji v. Genu*⁽¹⁾.

On appeal by the plaintiff the District Judge confirmed the decree for the following reasons:—

The case appears to me to be exactly parallel with the case cited by the lower Court, *Raoji v. Genu*, I. L. R., 22 Bom. 344. In that case it appears that a Vatan Register had been framed and that the declaration of the Civil Court was sought merely to induce the Collector to enter the name of Raoji rather than of Genu as representative Vatandar in place of Genu's father deceased. This was held not to be admissible under section 25, Act III of 1874. The law being

(1) (1896) 22 Bom. 344.

that while it is permissible to sue to prove that I am Vatandar and not an outsider it is not permissible for me who am admittedly a Vatandar to sue that I be declared representative Vatandar.

At first sight it appears as if the legislature intended to exclude the Civil Courts only in the case of the original framing of the Vatan Register. This is what is referred to in section 25. The method in which the register is to be framed is laid down in sections 26 to 32. Sections 33 to 37 seem to refer to questions arising after the framing of the register owing to the death of persons entered in the register.

Under section 36 the Collector has no option as to the person he is to enter in place of Vatandar deceased. He must enter his eldest son or other nearest heir. Decrees and orders of Civil Courts are conclusive proof of the facts declared therein. Such decrees, however, are I suppose decrees in *bonâ fide* litigation about subjects other than the actual right of succession. It being intended to prevent the evils of litigation about succession to Vatan.

In any case the case quoted above seems to me to bind me as it is as far as I can see exactly on all fours with the present case.

The plaintiff preferred a second appeal.

N. A. Shiveshvarkar for the appellant (plaintiff):—Under section 11 of the Civil Procedure Code of 1882, the Civil Courts are bound to entertain any suit of a civil nature unless its cognizance is barred either expressly or by implication by any enactment. In the present case the plaintiff sued for a declaration that he is the eldest son. Such a suit is not barred by the Hereditary Offices Act. The lower Courts relying on the decision in *Raoji v. Genu*⁽¹⁾ held that the suit was not cognizable by a Civil Court. This is a wrong view. The decision referred to has reference to section 25 of the Act. By that section the duty of framing the Vatan Register is cast upon the Collector. The Register having been framed the plaintiff in that suit asked for a declaration that he was the representative Vatandar alleging that the defendant took advantage of the plaintiff's absence and got himself recognized as such by the Collector. That suit was dismissed on the ground that the declaration, if made, would in effect be a declaration of the plaintiff's status as representative Vatandar and this duty was cast upon the Collector by section 25 of the Act and not upon the Civil Court. See the definition of "Representative

(1) (1896) 22 Bom. 344.

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Vatandar" given in section 4 of the Act. Representative Vatandar is a Vatandar registered by the Collector under section 25. The registration had already been made and the plaintiff wanted to get the registration altered. Such a suit could not be entertained by the Civil Court and it was dismissed. In the present case we do not seek the alteration of the register. Under section 25 our father had been registered as the representative Vatandar and the father having died, we want a declaration by the Civil Court that we are the eldest son, so that, we can, on such declaration being made, apply to the Collector to have our name registered in the place of our deceased father and the declaration would be binding on the Collector: section 36 of the Act. In support of our contention we rely on the unreported decision in second appeal No. 298 of 1903 which is on all fours.

K. M. Taleyarkhan for the respondents (defendants):—We submit that a suit like the present is not cognizable by the Civil Court. The duty of conducting all investigations under the Hereditary Offices Act is cast upon the Collector. By section 72 of the Act the Collector acts as a judicial officer and he alone has jurisdiction to investigate the matter: *Khando Narayan v. Apaji Sadushiv*⁽¹⁾. Besides, even if the Civil Court entertained the suit, its decision would not bind the Collector and he need not act upon it. The last paragraph of section 36 merely means that if at the time of the investigation one of the parties produces a certificate of heirship or a decree as mentioned in the section, the Collector need not hold further inquiry but must act upon the certificate or the decree. If such a certificate or decree is subsequently set aside then the Collector would proceed to inquire as to who is the eldest son or nearest heir.

In second appeal No. 298 of 1903 the contention of the plaintiff was that he and defendants 3 and 6 were the heirs and that defendant 1 was not the heir of the deceased Vatandar. Defendant 1's title was thus completely denied. Such a case would clearly be cognizable by a Civil Court. But when there is no

(1) (1877) 2 Bom. 370.

dispute as to who should officiate, then the matter is solely within the cognizance of the Collector.

SCOTT, C. J.:—The plaintiff sued for a declaration that he was the eldest son of a deceased Vatandar Police Patil who died two years and a half previously, stating that the cause of the suit was that in a dispute between him and the defendant the Collector had ruled that the defendant was the eldest son and that the plaintiff's name could not be entered as Vatandar Patil unless he established his right as eldest son by a decree of the Court.

It is contended on behalf of the defendant that this suit is not maintainable by reason of the provisions of the Bombay Hereditary Offices Act (Bombay Act III of 1874).

The defendant's contention commended itself to the learned District Judge because he considered himself bound by a decision of this Court in *Raoji v. Genu*⁽¹⁾ to decide that he had no jurisdiction. A reference to that decision will show that the *ratio decidendi* was that the case fell under section 25 of the Hereditary Offices Act under which the duty is imposed upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar, and that the relief asked for in the suit involved the determination by the Civil Court of a question which by the section was expressly reserved for the determination of the Collector.

Section 36 provides that the person who shall be entered as representative Vatandar after the death of a representative Vatandar is the eldest son or other person appearing to be the nearest heir of such Vatandar. The question who is the eldest son is a question of fact. If the fact be established, the Collector has no choice in the matter unless there appears to be a nearer heir. The conclusive determination of the question whether the statutory condition of eldership or heirship is satisfied becomes therefore a matter of importance to a person claiming to be the eldest son or nearest heir, and it is a question which is not by the words of the Act reserved for the exclusive determination of the Collector. This view of section 36 was taken by this Court in *Dalpat Jogidas v. Punja Zipa*⁽²⁾ when upon review it was held

(1) (1896) 22 Bom. 344.

(2) S. A. No. 298 of 1903 (Unrep.)

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that a suit for a declaration that the plaintiff was the nearest heir of a deceased representative Vatandar was maintainable notwithstanding that it was manifest that the declaration was sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

I, therefore, reverse the decree of the District Judge and remand the case to him for disposal on the merits.

Costs to be costs in the cause.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

1909.
 August 9.

BAJABA *alias* BAJIRAO VISHVANATH OKE (ORIGINAL PLAINTIFF),
 APPELLANT, v TRIMBAK VISHVANATH OKE AND TWO OTHERS
 (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch—Self-acquisition.

Certain family property was allotted to a member of one branch of the family in virtue of a compromise. It was subsequently purchased by a member of the other branch with his own money which was not part of the joint family money. The purchaser did not intend by the purchase to merge the property in the joint family property and excluded his brother from it.

Subsequently the brother having brought a suit for partition claimed a share in the property purchased by the defendant along with a share in the other joint property.

Held, that the plaintiff was not entitled to claim a partition subject to the right of the defendant to retain an additional quarter share for himself, but that the property purchased by the defendant became his self-acquisition.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

* Second Appeal No. 1033 of 1908.

Suit for partition.

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v.
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VISHVANATH.

One Vishvanath Ramchandra Oke, father of plaintiff and defendant 1, and Hari Krishna Oke were the representatives of two different branches of Oke family. Disputes having arisen between the two branches with respect to family property, Hari Krishna's mother, during his minority, filed against Vishvanath Ramchandra a suit which ended in a compromise, dated the 27th April 1867. Under the terms of the compromise Vishvanath Ramchandra was to remain in possession of the property, the subject of the suit, for seven years and then to hand over a moiety of the property to Hari Krishna. Hari Krishna, however, on the 24th September 1873, that is, one year before the expiration of the period of seven years fixed under the compromise, conveyed his moiety to Trimbak Vishvanath, defendant 1, for a consideration of Rs. 500.

In the year 1907 the plaintiff brought the present suit against defendant 1 and his two sons as defendants 2 and 3 for partition of the family property including the moiety purchased by defendant 1 from Hari Krishna in the year 1873. The plaintiff claimed a half share in the entire family property consisting of moveables, immoveables and their profits.

Defendant 1 contended that though he and the plaintiff were brothers, the property in suit was neither ancestral nor joint, that a moiety of the lands in dispute was lost to the family and was subsequently acquired by the defendant for himself with his own money by purchase in the year 1873, that the moiety thus acquired was his self-acquisition he having paid Rs. 500 for its price from his own private earnings and funds without receiving any assistance from the family property, that the plaintiff did not enjoy the profits of the said moiety, that the defendant being plaintiff's elder brother sometimes remitted money to the plaintiff by way of assistance and that the claim for the division of the other moiety was time-barred.

The Subordinate Judge found that the purchase by the defendant of a moiety of the lands in suit was proved and the said moiety was his self-acquired property, that the plaintiff had enjoyed the profits of the lands in suit as a co-sharer during

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twelve years preceding the suit and that the claim was, therefore, in time. He therefore decreed that the plaint lands be divided into four equal parts—good and bad—and one of the parts be given in the plaintiff's possession as his portion.

The plaintiff having preferred an appeal to the District Judge, the decree was confirmed on the following grounds :—

The question is whether he (defendant) made this purchase in such a way that it became his self-acquisition or whether it continued joint property of himself, father and brother. The lower Court is of the opinion that it was self-acquired and I concur.

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It seems to me as if this was an example of the rare case mentioned in the books where a co-parcener by his unaided efforts repels an assault on or recovers seized family property without assistance from the rest of the family or its property and that this repurchase does not necessarily merge in the joint estate.

There is further no sign that the defendant intended to merge these lands in joint family property on the contrary he seems to have practically excluded the plaintiff from the rest also of the property. His wife managed the whole landed property. He made from time to time small remittances to his brother, not amounting to half the proceeds and he has latterly procured these also.

I think then that this acquisition ought to be treated as separate and peculiar property of defendant.

The plaintiff preferred a second appeal.

S. R. Bakhle for the appellant (plaintiff) :—The Judge has treated the present case as an instance of a rare case mentioned in the books. Accepting that finding as binding we contend that the Judge was wrong in not applying the rule of Hindu law under which the acquirer gets a quarter share in the acquired property in addition to his own share. Setting apart a quarter share for the acquirer the rest of the property is divided equally among the co-parceners: see *Mitakshara*, chapter 4, section 5, paragraph 3—क्षेत्रे तुरीयांशमुद्धर्ता स्वभते शेषं तु सर्वेषां सममेव—“In the immoveable property the acquirer gets a fourth share and the rest is taken in equal shares by all.” This rule is based on the *dictum* laid down by *Shankha*. See also *Mayukha*, chapter 4, section 7, paragraph 3.

[BATCHELOR, J.:—The rule must have been laid down at the stage of the society when all property was considered as belonging to the family and the self-acquisition by a co-parcener was looked upon with disfavour. How is that rule applicable in the present advanced stage of the society unless it is shown to be justified by equity and good conscience?]

The texts have laid down the rule for the purpose of enforcing it. It may not be justifiable now. It is a rule laid down by Hindu law and it requires to be enforced when the Courts of facts find facts in such a way that its application becomes necessary.

The rule is discussed by West and Buhler in their Digest, page 718 (3rd Edn). They lay stress on the words हृत (*hit*=stolen), नष्ट (*nashṭ*=lost) and उद्धरेत् (*uddharet*=may recover) and say that the rule is not applicable to properties withdrawn from the family by voluntary alienation and subsequently recovered. The word हृत (*hit*=stolen) may imply a sense of violence in withholding the property but the other two words do not imply any violence. We contend that the property alienated voluntarily is property नष्ट (*nashṭ*=lost) to the family and would therefore be governed by the rule. The rule was considered by the Madras High Court in *Visulatchi v Annasamy*⁽¹⁾. West and Buhler say that the rule was recognized by the Bombay High Court in *Malhari v. Bhikoji*⁽²⁾, but a reference to the record of that case shows that the recovery was made with the assistance of joint family funds.

R. R. Desai for the respondents (defendants) was not called upon.

SCOTT, C. J.:—The question is whether certain land forms part of the joint family property of all the members of the Oke family who are the parties to the suit, or whether it is the separate property of the defendants.

According to the findings of the lower appellate Court the land was originally ancestral and was the subject of a suit brought on behalf of one Hari Krishna Oke against the branch of the Oke family to which the parties to this suit belong. The

(1) (1870) 5 Mad. H. C. R., 150.

(2) S. A. 534 of 1869 (Unrep.).

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litigation ended in a compromise in 1867 whereby the father of the parties to the suit was to remain in possession of land claimed for seven years, and then to convey it to the other branch. The representative of the other branch on the 24th September 1873 sold his interest which was to come into his possession under the terms of the compromise in the following year to the defendant 1 by a sale-deed for the sum of Rs. 500. It is found as a fact that Rs. 500 was not part of the joint family money but was provided by the defendant 1 on his own responsibility. The learned Judge also found that the defendant 1 did not intend by the purchase to merge this land in joint family property and excluded his brother from it.

It is contended on this state of facts that the defendant 1 is not entitled to the benefit of his purchase, but that he must partition the land with the other members of his family subject to a right under Hindu law of retaining an additional quarter share for himself. In support of this contention reliance is placed upon certain texts: Mitakshara, chapter I, section 5, paragraph 3; Mayukha, chapter IV, section 7, paragraph 3. If these texts involve the conclusion contended for by the defendants the result would be anything but equitable.

We however think that the comment upon the texts which is to be found in West and Bühler's Hindu Law (3rd Edn.), page 719, must be accepted as correct. The learned authors say: "It seems probable from the wording of the texts upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the words 'hrita' (*i. e.*, that which has been taken or seized) and 'nashta' (*i. e.*, that which has been lost) and 'uddharet' (*i. e.*, if he rescue or win back). Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claims to partition by his coparceners, yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased

property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy v. Debee Pershad Tewaree*.⁽¹⁾

This view receives support from the Judges of the Madras High Court, who in *Visalatchi v. Annasamy*⁽²⁾ said:—"The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time:—"Property unjustly detained which could not be recovered before" is the import of the ordinance of Manu, chapter IX, sl. 203."

For these reasons we confirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

G. B. R.

(1) (1866) 6 W. R. 58 (Ch. Rpt.).

(2) (1870) 5 Mad. H. C. R. 150 at p. 157.

APPELLATE CIVIL.

Before Mr. Justice Chaudhury and Mr. Justice Heaton.

MARDANSAHEB VALAD GANSHUSAHEB RATIMANI AND OTHERS
(ORIGINAL PLAINTIFFS), APPELLANTS, v. RAJAKSAHEB VALAD KASHIM-
SAHEB AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2, 4) RESPONDENTS.*

1909.
August 10.

Mahomedan law—Acknowledgment of son—Illegitimate son—Zina—Son by adulterous intercourse cannot be legitimised.

Under Mahomedan law, a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of *zina* (i. e., fornication, adultery or incest).

Muhammad Allahdad Khan v. Muhammad Ismail Khan⁽¹⁾, followed.

* Second Appeal No. 740 of 1908.

(1) (1888) 10 All. 289.

1909.
 MARDAN-
 SAHEB
 v.
 RAJAKSAHEB.

SECOND appeal from the decision of T. D. Fry, District Judge of Bijapur, reversing the decree passed by V. G. Kaduskar, Subordinate Judge of Haveri.

Mardansaheb and others filed a suit to recover possession of property which belonged to their uncle Maulasaheb.

Their claim was resisted by one Miyasaheb (defendant No. 4) who contended that he was the acknowledged son of Maulasaheb who had willed the property in his favour.

Miyasaheb was born of Jainabi. She was the wife of another; but she was divorced by her first husband. Miyasaheb was born after the divorce and before she was remarried to Maulasaheb. It appeared that there existed criminal intimacy between Maulasaheb and Jainabi even before remarriage.

The Subordinate Judge decreed the plaintiffs' claim holding that Miyasaheb was not the acknowledged heir and son of Maulasaheb, and that the will relied on by him was not proved.

The District Judge on appeal reversed this decree and dismissed the plaintiffs' claim, holding that the will was proved and that defendant No. 4 was the acknowledged son and heir of Maulasaheb. His reasons were as follows:—

"Mahomedan law no doubt recognizes the rights of a duly acknowledged son but there are restrictions on the power to acknowledge so as to confer these rights.

"In 15 All. 396 it was held following 10 All. 289 that a Mahomedan could not by acknowledging him as his son render legitimate a child whose mother *at the time of his birth* he could not have married by reason of her being the wife of another man

"Now when Maula married Jainabi by *nikka*, Jainabi had already given birth to Miyasaheb and, if at the time of the birth Jainabi was still the wife of another man then, under the authorities quoted, it will be incumbent on me to hold that the acknowledgment was invalid.

"By relying for the most part on Exhibits 24, 31 and 32, I hold that even if Jainabi's husband was still living when the child was born he had divorced his wife before that birth.

"It was thus open to Maula to 'acknowledge' Miyasaheb and in the state of the authorities as they now stand (10 Cal. 663), I should not be prepared to hold the acknowledgment was invalid even if it were proved that *at the time of conception* Maula was having adulterous intercourse with Jainabi.

"I hold that the 'acknowledgment' would not have been invalid in law."

The plaintiffs appealed to the High Court.

K. H. Kelkar for the appellant:—Under Mahomedan law, the doctrine of acknowledgment applies only to cases where the paternity of the child is doubtful and the evidence of marriage inconclusive. Here, Miyasaheb is born of *zina*: see *Muhammad Allahdad Khan v. Muhammad Ismail Khan*⁽¹⁾; *Nagar Mal v. Ali Ahmad*⁽²⁾. He cannot therefore be legitimated. See *Ashrufood Dowlah Ahmed Hossein v. Hyder Hossein Khan*⁽³⁾; Wilson's Anglo-Muhammadian Law, p. 162 (3rd Edn.); Ameer Ali, Volume II, p. 256 (3rd Edn.); *Mahammad Azmat Ali Khan v. Jalli Begum*⁽⁴⁾; *Sadat Hossein v. Mahomed Yusuf*⁽⁵⁾; Baillic's Mahomedan Law, p. 411; Huneefa, p. 414; *Dhan Bibi v. Lalon Bili*⁽⁶⁾.

G. S. Mulgaonkar for the respondent:—When a boy is born before marriage, he can be legitimated by acknowledgment, for there was a possibility of marriage between the parties at the time the boy was conceived. Refers to *Abdool Razack v. Aga Mahomed Jaffer*⁽⁷⁾; *Liaqat Ali v. Karim-un-nissa*⁽⁸⁾; *Aizunnissa Khatoon v. Karimunissa Khatoon*⁽⁹⁾.

CHANDAVARKAR, J.:—It is found by the lower appellate Court that the second respondent, Miyasaheb *valud* Maulasaheb, who was defendant No. 4 in the suit, which has led to this second appeal, was acknowledged by Maulasaheb as his son, and that the acknowledgment fulfils all the requirements of, and is therefore valid according to, Mahomedan law. This latter finding as to the legal validity of the acknowledgment is impugned before us upon the ground that, on the facts found, the second respondent must be held to have been born of what in Mahomedan law is called *zina*, fornication or adultery, and that such a boy cannot, according to that law, be acknowledged as son.

The findings of the learned District Judge in appeal are not sufficiently clear. He holds upon the evidence that "even if

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(1) (1888) 10 All. 289.

(2) (1888) 10 All. 396.

(3) (1886) 11 Moo. I. A. 94.

(4) (1881) 8 Cal. 422.

(5) (1883) 10 Cal. 663.

(6) (1900) 27 Cal. 801.

(7) (1893) L. R. 21 I. A. 56.

(8) (1893) 15 All. 396.

(9) (1895) 23 Cal. 130.

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Jainabi's husband was still living when the child was born, he had divorced his wife before that birth." But that leaves the question still open whether, at the time of conception, Jainabi had been divorced. On that point all the learned Judge says is that he "should not be prepared to hold the acknowledgment was invalid, even if it were proved that *at the time of conception* Maula was having adulterous intercourse with Jainabi."

It is, however, not necessary to send the case back for a finding on that question, because even upon the facts, so far found definitely, the acknowledgment cannot be legal, according to Mahomedan law.

Jainabi's marriage with Maulasaheb was subsequent to the birth of the second respondent. Whether at the time of conception, she was still the wife of her former husband, not having been divorced by him, or had ceased to be his wife by reason of divorce, the illegitimacy of the respondent in question is a proved fact in either case and he is a child born of *zina*, which includes both fornication and adultery.

In the Full Bench case of *Muhammad Allahdad Khan v. Muhammad Ismail Khan*⁽¹⁾ Straight, J., said (at p. 317):—

"Birth during wedlock, that is to say, legitimate birth, necessarily confers a right to inherit; illegitimate birth, that is, without wedlock subsisting between the father and mother at the date of the child's begetting, confers no such right. But where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another, who claims him as his son, according to the authorities I have quoted from, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category."

Mahmood, J., said (at p. 334):—

"Children born of *zina* (which means fornication, adultery or incest) can never be legitimated or entitled to inherit from their father. Nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is a *proved and established* fact."

This view of the Mahomedan law has been followed in *Liakat Ali v. Karim-un-nissa*⁽²⁾ and *Dhan Bibi v. Lalon Bibi*⁽³⁾. See

⁽¹⁾ (1888) 10 All. 289.

⁽²⁾ (1893) 15 All. 396.

⁽³⁾ (1900) 27 Cal. 801.

also Mr. Ameer Ali's Personal Law of Mahommedans, Volume II, Edition of 1908, page 256.

The decree appealed from must be reversed and that of the Subordinate Judge restored with costs throughout on the respondents.

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Decree reversed.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Butchelor.

BHIMAPPA *lin* TAMAPPA (ORIGINAL OPPONENT 10), APPLICANT, *v.*
KHANAPPA *alias* VENKAPPA *lin* HANMAPPA AND ANOTHER
(ORIGINAL APPLICANT AND OPPONENT 9), OPPONENTS.*

1909.

August 11.

*Curator's Act (XIX of 1841), sections 3, 4 and 14—Oath's Act (V of 1840)—
Death of representative Vatan-dar—Deceased's widow representative Vatan-
dar—Death of the widow—Application by the nearest heir of the deceased
male Vatan-dar for possession—Six months, calculation of—Property
claimed by right 'in succession'—Inquiry upon solemn declaration—
Affidavit upon solemn affirmation.*

One Kotrappa, representative Vatan-dar of Deshagat Vatan, died in 1892. His widow Basawa was entered on the Vatan Register as representative Vatan-dar and she held the Vatan property until her death in 1907. Within six months of Basawa's death, Khanappa, who claimed to be the nearest heir of Kotrappa, applied for possession of the property under the Curator's Act (XIX of 1841) and the Judge granted his application. One of the opponents to the application thereupon moved the High Court under the extraordinary jurisdiction contending that,

(1) Under section 14 of the Curator's Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the date of the application, and

(2) In granting the application the Judge did not follow the procedure which is made imperative by the words of section 3 of the Curator's Act (XIX of

* Application No. 61 of 1909 under the extraordinary jurisdiction.

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1841), that is, there was no inquiry upon solemn declaration of the complainant (applicant).

Held, confirming the order, that,

(1) The decease of the proprietor whose property was claimed by right "in succession" referred to in section 14 of the Curator's Act (XIX of 1841) included the decease of Basawa because she was, between the death of her husband and her own decease, the proprietor of the property claimed. All that was to be decided was who should be put into possession of the property in succession to the last deceased holder.

(2) The Judge having acted upon the application of the claimant in addition to his affidavit on solemn affirmation, the statements in the affidavit furnished sufficient grounds for action under section 4 of the Curator's Act (XIX of 1841) having regard to the provisions of the Oath's Act (V of 1840)

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of C. E. Palmer, Acting District Judge of Bijapur, in a miscellaneous application under the Curator's Act (XIX of 1841).

One Kotrappa bin Basappa was the last male proprietor of the Deshagat Vatan of Nir Budihal in the Bijapur District. He died on the 2nd June 1892 leaving him surviving a widow Basawa and three daughters. After Kotrappa's death the Deshagat Vatan was transferred to his widow Basawa's name in the Vatan Register and she was in possession and enjoyment of it till her death on the 14th November 1907. On the 29th November 1907 one Khanappa *alias* Venkappa *bin* Hanmappa Desai applied to the District Judge of Bijapur stating that as he was the nearest male heir of the deceased Kotrappa he was entitled to succeed to the property and prayed for the appointment of a curator on the ground that Tamappa *bin* Balappa and eleven other persons were wasting and misappropriating the property.

The Judge made an inquiry under the Curator's Act (XIX of 1841) and ordered that the possession of the Deshagat Vatan be delivered to the applicant Khanappa. In his judgment the Judge made the following remarks :—

On the 29th November 1907 the petitioner Khanappa applied to this Court to appoint a curator as the opponents were trying to take possession of the property by forcible means, and there was danger that the Deshagat servants would also misappropriate it. This Court was also asked to determine the right to posses-

sion. This application was supported by an affidavit and furnished sufficient grounds for action. Confirmation of the truth of the matters stated in the application is afforded by the written statement of opponent 11 (Exhibit 21) in which opponent 11 admitted taking possession of the house and moveables at Nir Budihal immediately after Basawa's death though he has since given up asserting his claim to the property in this miscellaneous proceeding. I see no reason therefore to hold that I was not fully justified in taking action under this Act.

Against the said order one Bhimappa *bin* Tamappa, heir and legal representative of Rangappa *bin* Tamappa who was opponent 10 in the District Court, preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V 1908) urging *inter alia* that the District Judge had no jurisdiction to entertain Khanappa's application under section 14 of Act XIX of 1841, that the Judge erred in putting the Act into operation in the absence of any circumstances proving that the original applicant Khanappa was "likely to be materially prejudiced if left to the ordinary remedy of a regular suit," and that the order of the Judge was based on inadmissible evidence. A *rule nisi* was issued calling on the opponents, that is, the original applicant and the original opponent 9, to show cause why the order of the Judge should not be set aside.

Mulla with G. K. Dandekar appeared for the applicant (original opponent 10) in support of the rule:—The Judge had no jurisdiction to put the Curator's Act in force in the present case. Kotrappa died in 1892. His widow Basawa succeeded him as a Hindu widow and she died in November 1907. The opponent claimed as a reversioner through Kotrappa and not through Basawa. But his application was not made within six months from Kotrappa's death though it was made within that period from Basawa's death. Therefore under section 14 of the Curator's Act the Judge had no jurisdiction to entertain the application.

Even granting that the Judge had jurisdiction, he acted with material irregularity in the exercise of his jurisdiction, because the conditions precedent to give jurisdiction under the Act as laid down in sections 3 and 4 were not satisfied. The inquiry should have been made on solemn declaration by the opponent and by witnesses and documents at the Judge's discretion. He

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should have satisfied himself with respect to four points mentioned in section 3 before he issued notices of the application. The application was accompanied by an affidavit and the Judge on the very day the application was made, issued notices to us and others. The affidavit cannot be said to be a solemn declaration and the order of the Judge directing notices to issue does not show that he was satisfied as to the four points mentioned in section 3. We have been prejudiced by the procedure adopted by the Judge: *Sato Koer v. Gopal Sahu*⁽¹⁾, *Krishnasami Pannikondar v. Muthukrishna Pannikondar*,⁽²⁾ *Abdul Rahiman v. Kutti Ahmed*⁽³⁾.

G. S. Rao appeared for opponent 1 (original applicant):—The Judge says in his judgment that he was satisfied as regards the truth of the allegations made by us in our application. On the day the notices were issued our application was supported by an affidavit and it furnished sufficient ground for action. Basawa was the widow of the last male holder Kotrappa and her status as representative Vatandar was recognized under section 2 of Bom. Act V of 1886. After her death we claimed the property in succession. The widow continues her husband's estate and really the husband's estate is determined by the death of the widow: Phadnis' Vatan Act, p. 132; Mayne's Hindu Law, p. 795 (6th Edn.); *The Collector of Masulipatam v. Caraly Peratu Narrainapali*⁽⁴⁾; *Lallubhai v. Mankuvarbai*⁽⁵⁾.

P. D. Bhide appeared for opponent 2 (original opponent 9).
Mulla, in reply.

SCOTT, C. J.:—This is an application under section 115 of the Code of Civil Procedure asking for our interference on the ground that the District Judge of Bijapur has acted without jurisdiction in making an order in a summary suit under section 4 of the Curator's Act XIX of 1841.

The occasion for the application which was made to the District Judge and upon which the order complained of was passed, was the death in 1907 of Basawa the widow of one

(1) (1907) 34 Cal. 929.

(3) (1886) 10 Mad. 68.

(2) (1900) 21 Mad. 364.

(4) (1861) 8 Moo. L. A. 529.

(5) (1876) 2 Bom. 388.

Kotrappa who died in 1892. Kotrappa was the representative Vatandar of a Deshagat Vatan in Bijapur territory, and on his death his widow Basawa was entered on the register as representative Vatandar and she held the Vatan property until her death. On her death an application was made by one Khanappa who claimed to be the nearest heir of Kotrappa, for possession of the property under the Curator's Act, and that application was granted. It is the order on that application which is now the subject of this proceeding.

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Two points have been raised by the applicant. First, he says that under section 14 of the Act of 1841, the provisions of the Act could not be put in force, because Kotrappa died more than six months before the date of the application. It is, however, admitted that the application was within six months of the death of Basawa, and it is contended on behalf of the opponents that the decease of the proprietor whose property is claimed by right "in succession" referred to in section 14, would include the decease of Basawa in the present case, because Basawa was, between the death of her husband and her own decease, the proprietor of the property which is claimed, and it is claimed "in succession" to her, that is to say, the claimant claims to succeed her in the possession of the property. This view of the section is, we think, correct.

The words of the Act appear to have been very carefully chosen. Thus in the beginning of the preamble we find a reference to "pretended claims of rights by gift or succession." Here the expression is "by succession" and is used to express the point of view of the claimant. Then in the second paragraph of the preamble we have "the circumstance of actual possession when taken upon a succession," that is, regarding the succession from the point of view of the Judge and not from the point of view of an interested party.

In the same way in section 14 we think that the words "by right in succession" are chosen to describe the point of view of the Judge and not the point of view of the interested parties. All that the Judge has to decide is who should be put into possession of the property in succession to the last deceased

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holder. An application was made to him to come to a decision upon that point within six months of the death of Basawa and we therefore think that he acted with jurisdiction in coming to his decision.

It was next objected that even if he had a right to come to a decision upon an application made to him by the applicant, he did not follow the procedure which is made imperative by the words of section 3 ; for, it is said that he did not inquire upon solemn declaration of the complainant whether there were strong reasons for believing that the party in possession had no lawful title. The materials upon which he came to his decision were the application and in addition to the application an affidavit upon solemn affirmation of the complainant Khanappa to the effect that he alone was the nearest heir to Basawa, that the opponents and distant *Bhaubands* were wasting and misappropriating the property and that this statement was true to his belief and knowledge. The learned District Judge held that the statements in this affidavit furnished sufficient grounds for action under section 4, and we cannot say that he has acted upon materials which are declared to be insufficient by the Act. He has, as it appears to us, entered into the inquiry upon statements made upon solemn affirmation which, having regard to the provisions of Act V of 1840, must be taken to be statements upon solemn declaration. We think there is no ground for interference and we dismiss the application with costs.

Separate sets of costs.

Application dismissed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

REV. ROBERT WARD (ORIGINAL OPPONENT), APPELLANT, *v.*

VELCHAND UMEDCHAND (APPLICANT), RESPONDENT.*

1909.

August 31.

Guardians and Wards Act (VIII of 1890), section 9—Application for guardianship of minor—Jurisdiction—Domicile—Place where the minor ordinarily resides.

One Panachand, a Jain inhabitant of Kapadwanj in the Ahmedabad District, lived in his house at that place. He died leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, who all lived in the house. Panachand's widow died about a year after him. Thereupon Panachand's house and a shop at Kapadwanj were sold and Lallu with his minor brother Wadilal went to Baroda in May 1906. At Baroda Lallu embraced Christianity and placed his minor brother, who was also baptized, in the American Mission Boarding House at that place. Afterwards Lallu renounced Christianity and in the beginning of February 1909 clandestinely removed his minor brother from the Mission Boarding House at Baroda and placed him in the Jain Boarding House at Ahmedabad. The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was removed from Ahmedabad at the instance of the appellant, a member of the American Mission at that place, and taken to Baroda. On the 29th April 1909 Lallu presented an application to the District Court at Ahmedabad for his appointment as the guardian of the minor's person. The appellant (opponent) at whose instance the minor was taken back to Baroda, contended that inasmuch as the minor lived at Baroda which was beyond the Court's jurisdiction, the Court had no jurisdiction to entertain Lallu's application under section 9 of the Guardians and Wards Act (VIII of 1890). The Court dismissed Lallu's application, he being found unfit for the appointment, but in the same proceeding appointed the respondent, a Jain pleader, on his application, as the guardian of the minor's person and property, on the ground that as the minor lived with his father till the father's death at Kapadwanj which was within the jurisdiction of the Court and as the minor's domicile followed that of his father which was Kapadwanj, the minor's domicile was in British India and he ordinarily resided within the Court's jurisdiction.

Held, on appeal by the opponent, setting aside the order, that the question of domicile was wholly irrelevant to the question of jurisdiction. The minor was living at Baroda and had no other place of residence. He had lived at Baroda for three years with the exception of twenty-eight days. Therefore Baroda was the place where the minor ordinarily resided within the meaning of section 9 of the Guardians and Wards Act (VIII of 1890).

* Appeal No. 94 of 1909.

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APPEAL against the decision of Dayaram Gidumal, District Judge of Ahmedabad, in the matter of an application for the guardianship of a minor under the Guardians and Wards Act (VIII of 1890).

One Panachand professing Jain religion lived in his house at Kapadwanj within the jurisdiction of the District Court at Ahmedabad. He died at that place leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, all of whom lived in the house. Panachand's widow survived him for about a year and after her death Lallu sold away the house at Kapadwanj and a shop and went to Broach with his minor brother, Wadilal. He lived there for a short time and thence went to Baroda with the minor in May 1906. There he embraced Christianity and became a preacher of the American Mission. The minor was also baptized and Lallu placed him in the Mission Boarding House at Baroda. Afterwards Lallu renounced Christianity and reverted to Jainism, the religion of his birth. The minor Wadilal lived at Baroda in the Mission Boarding House at that place from May 1906 till the beginning of February 1909 when Lallu clandestinely removed him to Ahmedabad and on the 15th February placed him in the Jain Boarding House at the place. The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was taken back to Baroda at the instance of Reverend Mr. Ward, a member of the American Mission at Ahmedabad. Thereupon, Lallu, on the 29th April 1909, made an application to the District Court at Ahmedabad for his appointment as the guardian of the person of the minor Wadilal.

The opponent, Reverend Mr. Ward, contended that the Court had no jurisdiction to entertain the application under section 9 of the Guardians and Wards Act (VIII of 1890) inasmuch as the minor's residence was Baroda which was outside the jurisdiction of the Court. He further contended that Lallu was not a fit person for the appointment.

The Judge found that the minor ordinarily resided within the Ahmedabad District, therefore, his Court had jurisdiction to entertain the application. His reason for the finding was that as the minor's father lived and died in his house at Kapadwanj

that place was the father's domicile and as the minor lived with his father till his death, the minor's domicile followed that of his father: Story on Conflict of Laws, section 46 Therefore Kapadwanj being the minor's domicile, his domicile was within British India in the Ahmedabad District.

The Judge further found that Lallu was of fickle mind as shown by the change of religions, therefore, he was not fit to be appointed minor's guardian. He therefore made a suggestion that he would consider an application made by any other proper person and rejected Lallu's application. Thereupon Lallu's pleader, Velchand Umedchand, a Jain by religion, presented an application for his appointment as the guardian. The Judge entertained this application in the proceedings started under Lallu's application and appointed Velchand guardian of the minor's person and also of his property because it was alleged that the minor's right to the family house at Kapadwanj had been wrongfully sold.

Against the said order the opponent appealed.

L. M. Wadia with *G. B. Rele* for the appellant (opponent):—The case presents three points for consideration. *First*, whether the District Court at Ahmedabad had jurisdiction to entertain Lallu's or Wadilal's application for the guardianship of the minor, *secondly*, whether the minor should be removed from the protection of the Mission at Baroda; and *thirdly*, whether it was not necessary to give us notice of Velchand's application for guardianship.

As to jurisdiction we contend that the District Court at Ahmedabad had no jurisdiction to entertain the application for guardianship. Section 9 of the Guardians and Wards Act lays down that an application for guardianship shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. Baroda has been the ordinary residence of the minor since May 1906 up to this day. No doubt he was at Ahmedabad for a short interval of about four weeks, but such a short stay cannot make Ahmedabad the ordinary residence of the minor. Further, when Lallu applied for guardianship on the 29th April the minor was not living at Ahmedabad. He

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was then living at Baroda. Under section 9 of the Act what is to be considered is the minor's ordinary residence and not his domicile. The Judge was wrong in going into the question of the minor's domicile. Our contention is further strengthened by the expressions used in the previous enactments. Section 4 of the Minors' Act, XX of 1864, refers to the minor's residence. Section 3 of the Indian Majority Act, IX of 1875, refers to the minor's domicile. While the present Act, VIII of 1890, refers to the minor's ordinary residence. If the Legislature contemplated that the minor's domicile should be determined then there was nothing to prevent them from inserting a provision to that effect in the present Act, especially as there was already that provision in the Majority Act. The minor has all along lived at Baroda for three years, therefore, Baroda is his ordinary residence where he is ordinarily to be found, and that being so, the District Court at Ahmedabad had no jurisdiction to entertain the application.

With respect to the second point provision is made in section 17 of the Act. Particular attention is to be directed to the minor's religion and his welfare. We submit that as the minor is a Christian, he should be associated with persons who profess Christianity. He is at present residing with the Missionaries at Baroda and is receiving training in Christian religion. So far as the welfare of the minor is concerned as he has been living in company of the boys in the Mission and has become attached to the Mission, and in fact he says in his affidavit that he is happy in the Mission Boarding House at Baroda and likes to live in it, we submit that he should not be removed from that place. Reverend Mr. Linzell, the Superintendent of the Mission Boarding House, has filed an affidavit in which he says that the minor is properly provided for and educated in the school and he is quite happy there. Under these circumstances it would not be proper to remove the minor from the Mission Boarding School and to hand him over to the applicant Velchand who is not known to him and whom the minor has never seen. Velchand is an utter stranger to him. In this connection the Judge has referred to the head-note of a case given in Mew's Digest, Infant column 1507. The case is *In re Hunt*⁽¹⁾. That case lays down that if a

(1) (1843) 2 Con. and Law., p. 373.

testamentary guardian, after taking charge of a minor, changes his religion he is liable to be removed from the office of guardian. That case has no bearing at all. It went entirely on its own facts. There are various cases of the High Courts in India and they support our contention. The gist of all those cases is that the welfare of the minor, irrespective of his or her age and irrespective of the parent's right of custody, is the main feature to be considered: *In the matter of Sathri*⁽¹⁾, *In the matter of Joshy Assam*⁽²⁾, *Mohood Lal Singh v. Nobodip Chunder Singha*⁽³⁾, *Bindo v. Sham Lal*⁽⁴⁾, *Re Gulbar and Libbar*⁽⁵⁾.

Our third contention relates to want of notice of Velchand's application. When the Court made up its mind with respect to Lallu's application, a hint was thrown that it would consider the application of any other fit and proper person for the guardianship of the minor. Thereupon Lallu's pleader Velchand Umedchand presented an application that he should be appointed guardian of the person and property of the minor and his application was granted. Velchand's application was taken by the Court in the proceedings started under Lallu's application. It is headed "In the matter of the application of Lallu Panachand." Velchand's application could not be entertained in the proceedings under Lallu's application because that application was dismissed. Velchand's application should have been given a separate number and a notice of his application should have been given to us under section 11 of the Act. We had no intimation of the application. We had gone to Court in connection with Lallu's application and Velchand's application came upon us as a surprise. The Judge says that no notice of the application was necessary as the appointment of the Názir is often made without notice. We submit that a pleader, though he is an officer of the Court to a certain extent, is not in the position of the Názir. The analogy of Názir is fallacious.

Jinnah with *Motichand* and *Devidas* for the respondent (applicant):—It is not necessary that a minor should reside within

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(1) (1891) 16 Bom. 307.

(3) (1898) 25 Cal. 881.

(2) (1895) 23 Cal. 290.

(4) (1906) 29 All. 210.

(1907) 32 Bom. 50.

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the jurisdiction of the Court at the time of the application. The minor in the present case was residing for some time at Ahmedabad, that is, within the jurisdiction of the Court. Further a minor cannot have a domicile of his own, nor can he change his deceased father's domicile which continues in him. It is not contested that Kapadwanj was the domicile of the father.

[SCOTT, C. J.:—The question of domicile is wholly irrelevant. The Act refers to the ordinary residence of the minor.]

We rely on *Sarat Chandra Chakrabati v. Forman*⁽¹⁾ and *Sheikh Mahomed Hossein v. Akbar Hossein*⁽²⁾.

Further the Mission Boarding School is located in the Cantonment at Baroda which is admittedly within British Jurisdiction. Therefore the minor would be amenable to the jurisdiction of the Courts in British India. The District Court at Broach would have jurisdiction in the matter.

SCOTT, C. J.:—An application was made by one Lallu Panachand to the District Judge of Ahmedabad under the Guardians and Wards Act, VIII of 1890, that the applicant might be appointed the guardian of the person of his minor brother Wadilal.

As to the main facts there is no dispute. The father of the minor died at Kapadwanj leaving two sons and a widow and property consisting of a house and shop. The sons are the applicant Lallu and the minor Wadilal. The widow was the mother of the minor. Within a year of her husband's death the widow died. Lallu thereupon sold the family house and shop and went to Broach and thence to Baroda where he embraced Christianity and became a preacher of the American Mission in that place. He was then sent as a preacher to Dhola in Káthiáwár. He left his minor brother Wadilal in the Mission House. Wadilal remained there from May 1906 until February 1909. In that month he was removed by Lallu without the consent of those in charge of the Mission, Lallu having previously been dismissed from the service of the Mission. Lallu came to Ahmedabad bringing his brother with him and took service in that city. He placed his brother on the 15th of February in a Jain Boarding

(1) (1889) 12 All. 218.

(2) (1872) 17 W. R. 275 (Civ. Bnl.).

House. On the 15th of March by the instrumentality of one Mulji, a preacher of the American Mission, he was removed from the Boarding House to the house of Mr. Ward, a member of the Mission residing in Ahmedabad, and the following day was sent to the Mission at Baroda where he has since remained.

The application of Lallu was made to the District Judge on the 29th of April. At that time the minor had, therefore, been living in Baroda for nearly six weeks. For twenty-eight days prior thereto he had been living in Ahmedabad and for the preceding 2½ years or more had been living at Baroda.

The District Judge holding that he had jurisdiction under the Act on the ground that his Court had jurisdiction in the place where the minor ordinarily resides as provided by section 9, passed an order for the appointment of a Pleader of his Court to be guardian of the person and property of the minor.

An appeal has been preferred from that order, the appellant being the representative of the American Mission in face of whose opposition the order was made.

The first point taken on behalf of the appellant is that the District Judge had no jurisdiction in the matter at all, that he would only have jurisdiction if the minor ordinarily resided within the jurisdiction of his Court. It is contended on behalf of the appellant that the minor ordinarily resides where he is ordinarily to be found and he is ordinarily to be found in Baroda. He had been there for six weeks continuously at the date of the application and with the exception of twenty-eight days he had been there for nearly three years.

The learned District Judge did not found his jurisdiction upon the fact that the minor had resided in Ahmedabad between the 15th of February and the 15th of March of this year, but he held that, because the minor's father had up to the time of his death resided in Kapadwanj the minor's domicile was in British India in the Judicial District of Ahmedabad and that therefore being so domiciled the minor must be taken to ordinarily reside within that district. It is very easy to reduce such an argument as this to an absurdity.

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We think that the question of domicile is wholly irrelevant to the question of jurisdiction in such a case as the present. The words of the Act alone have to be construed, and the words of the Act are "that an application must be made to the District Court having jurisdiction in the place where the minor ordinarily resides".

The minor is living in Baroda and he has no other place of residence, and he has, with the exception of twenty-eight days, lived in Baroda for nearly three years. We, therefore, think that Baroda is the place where the minor ordinarily resides within the meaning of section 9.

It is argued on behalf of the respondent (with what correctness we do not know) that the Mission House in Baroda where the minor is living is in British Cantonments and is within the jurisdiction of the Judicial District of Broach. It may be so, but even if it is so, that does not give jurisdiction to the District Judge of Ahmedabad.

We set aside the order of the District Judge and allow this appeal with costs.

Order reversed.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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September 15.

PARASHARAM VISHNU DABKE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1-5), APPELLANTS, v. PUTLAJIRAO KALBARAO AND OTHERS (ORIGINAL DEFENDANTS 6-18) *

Bombay Regulation V of 1827, section XV, clause 3—Usufructuary mortgage of 1869—Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property.

A usufructuary mortgage executed in the year 1869 contained the following agreement:—

"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day,

* Second Appeal No. 997 of 1908.

redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

In the year 1901 the mortgagee having brought a suit for the recovery of the mortgage debt by sale of mortgaged property, the first Court allowed the claim, but the appellate Court reversed the decree and dismissed the suit on the ground that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagee has no higher or better right than he has under a simple usufructuary mortgage.

Held, on second appeal by the plaintiff, that the mortgage in suit was governed by clause 3, section XV of Regulation V of 1827, and there being nothing in the terms of the agreement between the parties which either expressly or by implication indicated that the property should not by means of a suit be applied in liquidation of the debt, the suit would lie.

The decree of the appellate Court reversed and that of the first Court restored.

Mahadaji v. Joti⁽¹⁾ and *Ramchandia v. Tripurabai*⁽²⁾, followed.

Shank Idrus v. Abdul Rahiman⁽³⁾, *Sadashiv v. T'anjat'rao*⁽⁴⁾ and *Krishna v. Hari*⁽⁵⁾, explained.

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Ratnagiri, reversing the decree passed by Sheshgiri, R. K., Subordinate Judge of Dapoli.

The property in suit originally belonged to three brothers, Kalbarao (father of defendants 6-8), Abujirao and Bajirao. They mortgaged it on the 9th April 1869 to Vishnu Raghunath Dabke, an ancestor of the plaintiffs and defendants 1-5, for Rs. 1,750. The mortgage was usufructuary. The material portion of the deed was as follows:—

Accordingly as abovesaid we all three of us have this day delivered over into your possession for the enjoyment as mortgagee the 33 *thikans* in all of our share consisting of the rice fields and *varhas* lands. You may yourself make the *vahvat* thereof or may give to others on rent and *ghumav*; and whatever rents and profits you will get is to be applied by you towards the satisfaction of interest (*i.e.*, in lieu of interest) and you should pay the Government assessment in the *khata* of Kalbarao, our eldest brother, in whose

(1) (1892) 17 Bom. 425.

(3) (1891) 16 Bom. 303.

(2) (1898) P. J., p. 43.

(4) (1895) 20 Bom. 296.

(5) (1908) 10 Bom. L. R. 615.

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name the *khata* stands in the Government records. The amount of Rs 1,750 is borrowed on the said premises. We three of us shall after paying off the said amount of debt after fifteen years from this day redeem our premises. Perhaps any one out of us three might within the period pay off at one time the amount of rupees according to his share you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the rupees received.

In 1880 Vamnaji Vishnu Dabke, a deceased son of the mortgagee, obtained a money decree against Kalbarao. In execution of that decree the mortgaged property was sold and was purchased by Ganesh Vasudev Joshi on the 11th October 1884. On the 5th April 1889 Ganesh Vasudev Joshi sold his title to plaintiff 1.

On the 18th January 1906 the plaintiffs brought the present suit alleging that they were in possession of the mortgaged property by themselves or through tenants till the year 1899 when defendants 6—8 denied the plaintiffs' title and asserted their own and that Rs. 1,975 were due to them under the mortgage. The plaintiffs, therefore, prayed for possession of the property as owners under the purchase from Ganesh Vasudev Joshi or as mortgagees or in the alternative to recover the sum due to them under the mortgage by sale of the mortgaged property.

Defendants 1—5, who were brothers of plaintiffs 1—5 and cousins of plaintiff 6, admitted the plaintiffs' claim. They were joined as defendants because they were unwilling to be joined as co-plaintiffs.

Defendants 6—8 answered *inter alia* that the property in suit was their ancestral estate and the plaintiffs had no interest therein, that the auction sale against their father Kalbarao did not pass more than his individual interest, that the delivery of possession at the auction sale was only nominal and the plaintiffs never got actual possession, that they were all along in possession and the claim was time-barred, and that they did not admit the mortgage transaction and nothing was due under it.

The Subordinate Judge found that the plaintiffs' title as owners was not proved, that they were not in possession within twelve years before the suit, that they were not entitled to

possession as purchasers or mortgagees, that the mortgage relied on by the plaintiffs was valid and proved and that the plaintiffs were entitled to recover Rs. 1,975 under the mortgage. He therefore passed a decree directing the defendants to pay to the plaintiffs and defendants 1—5 Rs 1,975 with plaintiffs' costs within six months from the date of the decree and in default the amount to be recovered by sale of the mortgaged property or a sufficient portion thereof. The following are some of the observations of the Subordinate Judge in his judgment :—

This is the case of a mortgagee in possession obtaining a money decree and subsequently selling the equity of redemption through a transferee and ultimately buying it himself from the auction-purchaser. If section 99 of the Transfer of Property Act applied such a sale, held otherwise than by instituting a suit, would be void (I L R 12 Mad 325, I L R 14 Mad. 74, Bombay Law Reporter VII, page 1). The only question is whether the principle of this section would be applicable to the present mortgage, which is of 1869, having regard to clause (c) of section 2 of the Act, which excludes from the operation of the Act, any right or liability arising out of a legal relation constituted before the Act came into force. The case reported at page 129 of I L R 10 Madras is an instance of the section being applied to a mortgage passed before the Act came into force. See also I L R 12 Cal 583. Besides I L R 1 Cal. 337 was decided before the Act and laid down that a mortgagee is not entitled by means of a money decree obtained on a collateral security to obtain sale of the equity of redemption separately. This case was followed by our own High Court in I. L R 4 Bom 57 and I L R 5 Bom 5. These authorities lead me to hold that even apart from the Act, the sale held otherwise than by a suit upon a decree obtained by the mortgagee was invalid, and that plaintiffs did not acquire a valid title by their ultimate purchase from the auction-purchaser. It is true the mortgagee transferred his decree before execution, but the transfer was subject to the equities which the mortgagor might have enforced under section 233, Civil Procedure Code, against him (I. L. R 22 Cal 813).

On appeal by defendants 6—8 the Assistant Judge found that the mortgage sued on was not subsisting, that the plaintiffs were not entitled to recover anything under it, and that the claim was barred by the defendants' adverse possession. He, therefore, reversed the decree and dismissed the suit. In the course of his judgment the Assistant Judge made the following remarks :—

The ruling in *Krishna v. Hari*, 10 Bom. L. R. 615, dispels all the delusion on the question of law involved in a case like the present. Exception was taken at the bar to the correctness of the decision on the ground that it is

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inconsistent with a previous decision of a division bench of our High Court reported at p. 425 of I. L. R. 17 Bom. (*Mahadaji v. Joti*). It was further argued that the last quoted decision was not brought to their Lordships' notice when *Krishna v. Hari* was decided and it was consequently not referred to and considered. I cannot accept this argument as sound. The main test is, whether the property is hypothecated or whether it was the intention of the parties to make the property liable to be brought to sale in case the promised payment was not made. Their Lordships had before them this sound test and they have observed: "We do not find that this document contains anything more than a personal and conditional promise to pay. We do not see any indication that the property was hypothecated or that it was ever the intention of the parties that it should be liable to be brought to sale in case the promised payment was not made." It was therefore absolutely necessary to refer to the ruling in *Mahadaji v. Joti*, 17 Bom. 425, for in that case Candy, J., has distinctly observed "there was a distinct covenant to pay the principal and the land was security for the same," (p. 428). The principle enunciated in the latest ruling cited above has been long ago recognized by our High Court (*Shaik Idrus v. Abdul*, 16 Bom. 303). The reasons given in the full Bench Madras decision (*Kangaya v. Kalimuthu*, 27 Mad. 526) can be very easily refuted. But as there is an express ruling of our High Court it is not necessary to do so.

Even if the mortgage as regards lands were a combination of a simple and usufructuary mortgage the suit having been instituted more than 12 years after the due date has been barred (*Vasudeva v. Shrinivasa*, 9 Bom. L. R. 1104).

Plaintiffs and defendants 1—5 preferred a second appeal.

K. N. Koyaji for the appellants (plaintiffs and defendants 1—5):—The Assistant Judge erred in reversing the decree of the first Court for sale. The present case is governed by Regulation V of 1827, section XV, clause 3. It is a settled law in this Presidency that in cases governed by the Regulation, the mortgaged property is liable to sale where there is promise to pay: *Mahadaji v. Joti* ⁽¹⁾, *Yashvant v. Vithal* ⁽²⁾, *Henraj v. Trimbak* ⁽³⁾, *Ramchandra v. Tripurabai* ⁽⁴⁾. In *Shaik Idrus v. Abdul Rahiman* ⁽⁵⁾ and *Sadashiv v. Vyankatrao* ⁽⁶⁾ there was no promise to pay, so those cases are inapplicable. The ruling in *Krishna v. Hari* ⁽⁷⁾ is distinguishable. The judgment in that case proceeded on the basis that there was a conditional promise to pay.

(1) (1892) 17 Bom. 425.

(2) (1895) 21 Bom. 267.

(3) (1897) P. J., p. 416.

(4) (1898) P. J., p. 43.

(5) (1891) 16 Bom. 303.

(6) (1895) 20 Bom. 296.

N. V. Mandlik for the respondents (defendants 6—8):—The appellants cannot claim the right of sale, the bond being, as found by the lower Court, a purely usufructuary one. The case is governed by the Transfer of Property Act which provides, section 67, that a usufructuary mortgagee is not entitled to get the property sold. Even if the case be governed by Regulation V of 1827, still there is no personal covenant in the deed sued on. The mortgagee is to hold possession of the property only. He has no right of sale: *Sadashiv v. Vyankatrao* ⁽¹⁾, *Shaik Idrus v. Abdul Rahiman* ⁽²⁾, *Krishnaji v. Wasudeo* ⁽³⁾, *Jafar Husen v. Ranjit Singh* ⁽⁴⁾. Even admitting that there is a personal covenant, still that is not sufficient. There must be in addition to that a right of sale specifically given: *Krishna v. Hari* ⁽⁵⁾, *Kashi Ram v. Sardar Singh* ⁽⁶⁾, *Shaik Idrus v. Abdul Rahiman* ⁽²⁾, *Krishnaji v. Wasudeo* ⁽³⁾.

As to hypothecation, the definition of mortgage requires the creation of security or hypothecation; see section 53 of the Transfer of Property Act. A mere hypothecation clause by itself in a usufructuary mortgage does not give the mortgagee a right to sell which, as usufructuary mortgagee, he does not possess. The rulings in *Ramchandra v. Tripurabai* ⁽⁷⁾, *Yashvant v. Vitthal* ⁽⁸⁾ and *Mahadaji v. Joti* ⁽⁹⁾ are inapplicable. In those cases there was a personal covenant and a right of sale was contemplated, while the mortgage in the present case is a simple usufructuary mortgage. The Assistant Judge in appeal was conversant with the language in which the bond is written.

Section 9J of the Transfer of Property Act is applicable, and if it cannot directly apply, it embodies the law as it was administered before its enactment and is not a departure from that law: *Sathuwayyan v. Muthusami* ⁽¹⁰⁾, *Durgayya v. Anantha* ⁽¹¹⁾, *Bhuggobutty Dossee v. Shamachurn Bose* ⁽¹²⁾, *Martand v. Dhondo* ⁽¹³⁾

(1) (1895) 20 Bom. 296.

(2) (1891) 16 Bom. 303.

(3) (1901) 3 Bom. L. R. 156.

(4) (1893) 21 All. 4.

(5) (1908) 10 Bom. L. R. 615.

(6) (1905) 28 All. 157.

(7) (1898) P. J., p. 43.

(8) (1895) 21 Bom. 267.

(9) (1892) 17 Bom. 425.

(10) (1888) 12 Mad. 325.

(11) (1890) 14 Mad. 74.

(12) (1876) 1 Cal. 337.

(13) (1897) 22 Bom. 624.

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1909, and *Chundra Nath Dey v. Burrol Shoondury Ghose*⁽¹⁾. In
 PARASHARAM *Husein v. Shanlargo*⁽²⁾ the facts were altogether different.

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SCOTT, C. J. :—The lower appellate Court has reversed a decree for sale obtained by the plaintiffs as mortgagees. The ground assigned for this decision is that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period the mortgagee has no higher or better rights than he has under a simple usufructuary mortgage.

The mortgage in question was effected in the year 1860. At that date the right of sale by mortgagees in the mofussil was governed by Regulation V of 1827, section XV, clause 3, which provides that in the absence of any special agreement or recognized law or usage to the contrary either party may at any time by the institution of a civil suit cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner.

In the case of mortgages prior in date to the time when the Transfer of Property Act was extended to this Presidency, the then existing rights of the parties remain unaffected: section 2 of Act IV of 1882. We are, therefore, in this case only concerned with the law enacted by the Regulation and with the terms of the agreement between the parties.

The instrument of mortgage after providing that the mortgagee in possession should manage the property, taking the profits in lieu of interest, proceeds:

"The amount of Rs 1,750 is borrowed on the said premises. We three of us shall after paying off the said amount of debt after 15 years from this day redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

The period of 15 years has long since expired and the question we have to determine is whether there is contained in the words above quoted expressly or by implication any agreement that

(2) (1898) 23 Bom. 119.

the property shall not by means of a suit be applied in liquidation of the debt. We think there is not.

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The case is very similar to those of *Mahadoji v. Joti* ⁽¹⁾ and *Ramchandra v. Tripurabai* ⁽²⁾. There is a distinct covenant to pay after fifteen years, with an option to pay within that period, the money borrowed on the premises.

It is an agreement of a different class from those which were under consideration in *Shah Idrus v. Abdul Rahiman* ⁽³⁾ and *Sadashiv v. Vyankatrao* ⁽⁴⁾. In these cases there was no promise by the mortgagor to pay, but it was provided that he should be free to take possession whenever he chose to pay after the fixed period agreed upon for the mortgagee's enjoyment. In the case of *Krishna v. Hari*, ⁽⁵⁾ relied upon by the learned Judge in the Court below the agreement was of the same kind as that in *Shah Idrus* case ⁽³⁾.

We reverse the decree of the lower appellate Court and restore that of the first Court with costs throughout other than the costs of cross-objections.

Decree reversed.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr Justice Batchelor.

GANESH NARAYAN SATHE (ORIGINAL OPPONENT), APPLICANT, v.
PURUSHOTTAM GANGADHAR KARVE (ORIGINAL APPLICANT),
OPPOSANT.*

Civil Procedure Code (Act V of 1908), section 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a

* A plica No 120 of 1909 under extraordinary jurisdiction.

(1) (892) 17 Bom 425.

(3) (1891) 16 Bom, 303.

(2) (1898) P. J, p. 43.

(4) (1895, 20 Bom. 296.

(5) (1908) 10 Bom, L. R. 615.

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declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable.

The plaintiff brought a suit in the Court of the First Class Subordinate Judge and finally obtained a decree declaring that an attachment on certain money, already lying in deposit in that Court, levied by the defendant in execution of his Small Cause Court decree was invalid and decreeing that the defendant should repay the same to the plaintiff. In execution of the said decree in the suit of the Court of the First Class Subordinate Judge the plaintiff applied to the Small Cause Court for the refund of the money and that Court passed an order for the refund. The defendant, thereupon, preferred an application to the High Court under the extraordinary jurisdiction.

Held, setting aside the order, that such an order could only be made if it was necessary for two purposes, namely, for the ends of justice or to prevent the abuse of the process of the Court. The plaintiff had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of V. V. Tilak, Judge of the Court of Small Causes at Poona.

One Ganesh Narayan Sathe obtained three money decrees, Nos. 597, 598 and 599 of 1904, in the Court of Small Causes at Poona against Yamunabai, widow and legal representative of her deceased husband Mahadev Gangadhar Karve. In execution of the said decrees, Ganesh Narayan Sathe attached a sum of Rs. 3,000 lying in deposit in the Court of the First Class Subordinate Judge of Poona as the price of the share of the deceased Mahadev Gangadhar Karve in a certain house. Thereupon Purushottam Gangadhar Karve, the brother of the deceased, applied to the Court of Small Causes as well as to that of the First Class Subordinate Judge for the removal of the attachment, but his applications being rejected, he filed three suits, Nos. 264, 265 and 266 of 1905, in the Court of the First Class Subordinate Judge for a declaration that the sum of Rs. 3,000 was not liable to attachment and for a decree ordering Ganesh Narayan Sathe to refund the money, if any, received by him. The suits were dismissed by the First Class Subordinate Judge, but his decrees were reversed by the District Court in appeals and the decrees of the District Court were confirmed by the High Court in second appeals. In the meanwhile Ganesh Narayan Sathe

having recovered the money under attachment, Purushottam Gangadhar Karve applied to the Court of Small Causes for an order directing Ganesh to repay the money into Court for the purpose of depositing it in the Court of the First Class Subordinate Judge.

The opponent Ganesh Narayan Sathe contended *inter alia* that the Court of Small Causes had no jurisdiction to entertain the application and that it should have been made to the Court of the First Class Subordinate Judge.

The Judge of the Court of Small Causes overruled the opponent's contention and granted Purushottam's application. He passed an order directing Ganesh to refund the money and on his failure to do so, the applicant to apply for the execution of the order for the following reasons :—

It will be observed that the order of attachment was made by this Court and not by the First Class Subordinate Judge. It will also be observed that the three declaratory suits were brought in the First Class Subordinate Judge's Court as this Court has no jurisdiction to entertain such suits. Ganesh argues that this Court not being "the Court of first instance" within the meaning of section 141 of the new Code has no jurisdiction to order refund in pursuance of the decrees of the High Court in the three declaratory suits. But if petitioner applies to the First Class Subordinate Judge his jurisdiction may be questioned on the ground that the order of attachment and the subsequent order of payment to Ganesh were not made by him. It would be absurd to contend that such is the effect of the law as it stands. I think that under section 151 of the new Code I have an inherent right to order refund and to do everything and to make every order fairly and properly consequential on the confirmation by the High Court of the decrees passed by the appellate Court in the three declaratory suits.

The opponent Ganesh Narayan Sathe preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging that as Purushottam Gangadhar Karve was not a party to the Small Cause suits, the lower Court erred in exercising the jurisdiction which was not vested in it by law. A *rule nisi* was issued requiring Purushottam Gangadhar Karve to show cause why the said order should not be set aside.

R. R. Desai for the applicant (original opponent) in support of the rule :—After the decree of the Small Cause Court was

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executed by attachment and recovery of the amount deposited in the Court of the First Class Subordinate Judge, the Small Cause Court became *functus officio* and it had no power to make any further order, namely, the order for the refund. This is not a case of restitution. The opponent was not a party to the decrees of the Small Causes Court and no order could be passed on his application to that Court. Section 151 of the Civil Procedure Code has no application to the facts of the case. That section applies to cases in which such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

M. R. Bodas for the opponent (original applicant) to show cause:—We contend that the order can be supported under section 151 of the Civil Procedure Code. That section is intended to prevent injustice. If we had applied to the Court of the First Class Subordinate Judge, the present applicant would have objected on the ground that the orders for attachment and payment to him of the money were not passed by that Court and therefore it had no jurisdiction to entertain our application. Moreover, the ends of justice would be equally satisfied whether the amount is refunded by the order of the Small Cause Court or by that of the Court of the First Class Subordinate Judge.

SCOTT, C. J.:—In this case the applicant obtained a decree declaring that an attachment upon certain money effected through the Small Cause Court was invalid and decreeing that the defendant should repay the same to the plaintiff. That was a decree which was confirmed by the High Court and would in ordinary course be executed by the First Class Subordinate Judge in whose Court the suit was filed. Instead, however, of proceeding to execute in that Court the opponent proceeded to the Small Cause Court which, prior to the filing of the suit in the First Class Subordinate Judge's Court, had finished with the litigation so far as it was concerned. Notwithstanding the fact that the opponent was entitled to execute the decree obtained by him, the Judge of the Small Cause Court purporting to act under section 151 of the present Civil Procedure Code, directed the applicant, who was the defendant in the First Class Subordinate

Judge's Court, to refund the money obtained by him in execution from the Small Cause Court. Such an order could only be made if it was necessary for the ends of justice or to prevent the abuse of the process of the Court. We do not think that it can be said to have been necessary for either purpose because the opponent had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court. We, therefore, set aside the order with costs.

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Order set aside.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

KRISHNA TANHAJI (ORIGINAL DEFENDANT), APPELLANT, v. ABA SHETTI PATIL (ORIGINAL PLAINTIFF), RESPONDENT.*

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July 13.

Transfer of Property Act (IV of 1882), section 54—Sale—Compromise—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary.

The terms of a compromise affecting a claim to land of the value of less than Rs. 100 were reduced to writing. The document was not registered, nor was the transaction accompanied by delivery of possession. The material provisions of the deed were as follows :—

"You and we are co-sharers. In your and our land, Survey No. 20, there is a well. Therein you and we have a joint share. Partition is to be made including it. After the said (survey) number is divided, we shall give 9 *pands* more from our share and both of us should put up a bandh (embankment) in the middle of the well, and possession and enjoyment should be carried on according to our respective shares. According to this condition we should not cause obstruction to each other. One who will act in contravention of this agreement will be able to reimburse loss which may be caused."

The lower appellate Court regarded the transaction as a sale which under the provisions of the Transfer of Property Act (IV of 1882) required delivery of possession in order to validate it.

Held, that the terms of the deed did not bring the transaction within the category of a sale, as defined in the Transfer of Property Act (IV of 1882).

* Second Appeal N. 934 of 1908.

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Held, further, that the document in question merely embodied a compromise between the parties and was in effect an acknowledgment of existing rights, and that therefore no delivery of possession was necessary.

Rani Mena Kuwar v Rani Hulas Kuwar (1), followed.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, modifying the decree passed by R. K. Bal, Subordinate Judge of Sinnar.

The plaintiff sued to recover from the defendant a certain piece of land, alleging that it was his ancestral land and had been unlawfully occupied by the defendant.

The defendant pleaded ownership and long possession.

On the 4th August 1902, the parties had entered into an agreement, which ran as follows —

“You and we are co-shares In your and our land, Survey No. 20, there is a well. Therein you and we have a joint share Partition is to be made including it. After the said (survey) number is divided, we shall give you 9 *pands* more from our share and both of us should put up a *bandh* (embankment) in the middle of the well and possession and enjoyment should be carried on according to our respective shares. According to this condition we should not cause obstruction to each other One who will act in contravention of this agreement will be able to reimburse loss which may be caused. We have passed this agreement of our free will and pleasure ”

This document was not registered, nor was it accompanied by delivery of possession. The value of the land affected by the compromise was less than Rs. 100.

The Subordinate Judge found that the plaintiff had been owner of the land in dispute but that he had given a portion of it to defendant in pursuance of a compromise. He decided the plaintiff's claim to the lands excepting the portion of it covered by the compromise.

On appeal, the District Judge held that the document was ineffectual as it was not registered and was not accompanied by actual delivery. He therefore awarded plaintiff's claim in full.

The defendant appealed to the High Court.

(1) (1874) L. R. 1 I. A. 157 at p 166.

R. S. Pandit, with *Manubhai Nanabhai*, for the appellant.—The transaction does not amount to a “sale” as defined by section 54 of the Transfer of Property Act. No “price” has been paid for the land: see *Thiruvengidachariar v. Ranganatha Aiyangar*⁽¹⁾. It is only a compromise. It is based on the assumption of an antecedent title and is acknowledgment of the same: *Rani Mewa Kuwar v. Rani Hulas Kuwar*⁽²⁾.

Delivery of possession is, therefore, not essential to make the transaction valid. The land being worth less than Rs. 100 the document need not be registered.

D. A. Khare, for the respondent.—The words in the deed are:—“he shall give you 9 *lands* more from our share” There being thus no consideration the transaction is a gift. If there is consideration it may amount to an exchange. The transaction cannot stand as the document is neither registered nor accompanied by delivery of possession.

CHANDAVARKAR, J.—The document (exhibit 29) which embodies the terms of a compromise between the parties has been apparently treated by the learned District Judge as a sale, which under the provisions of the Transfer of Property Act requires a delivery of possession in order to validate it. But the terms of the deed do not bring the transaction within the category of a sale, as defined in that Act. The document in question merely embodied a compromise between the parties, and, as held by the Privy Council in *Rani Mewa Kuwar v. Rani Hulas Kuwar*⁽²⁾, the nature of a compromise is that it is an acknowledgment of the existing rights of the parties. No delivery of possession was necessary in this case in order to give effect to the compromise. That being the only point argued here, we reverse the District Judge’s decree and restore that of the Subordinate Judge with costs both of the second appeal and the appeal in the lower Court on the respondent.

Decree reversed.

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(1) (1903) 13 Mad. L. J. R. 500.

(2) (1874) L. R. 1 I. A. 157 at p. 166.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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September 1.

PURUSHOTTAM HARGOVANDAS, LEGAL REPRESENTATIVE OF DECEASED GIRDHARLAL HARGOVANDAS (ORIGINAL PLAINTIFF, JUDGMENT-CREDITOR), APPELLANT, v. RAJBAL, LEGAL REPRESENTATIVE OF DECEASED THAKORE HIRAJI DOLATSANG (ORIGINAL DEFENDANT, JUDGMENT-DEBTOR), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 235, 320—(Gujarat Talukdār's Act (Bom. Act VI of 1888), sections 28, 29B and 29E)—Decree against Talukdār—Execution—Decree transferred to Talukdār's Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under section 29E of the Gujarat Talukdār's Act (Bom. Act VI of 1888)—Managing Officer—Talukdār's Settlement Officer.

When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal

* First Appeal No. 196 of 1908.

(1) Sections 28 and 29 B, C of the Gujarat Talukdār's Act are as follows:—

28. (1) With the sanction of Government, the Talukdār's Settlement Officer or any other officer appointed by Government for this purpose may, upon the written application of a talukdār in this behalf, take charge of such talukdār's estate and keep the same under his management for such period as may be agreed upon.

(2) Where a talukdār's estate is held by co-sharers in undivided shares, an application signed by co-sharers holding an aggregate interest of not less than three-fourths of the whole estate shall, for the purposes of sub-section (1), be deemed to be an application by a talukdār in respect of such estate.

29B. (1) Where any talukdār's estate has been taken under management by Government Officers under section 26 or 28, the Managing Officer may publish in the *Bombay Government Gazette* and in such other manner as the Governor in Council may by general or special order direct, a notice in English and also in the Vernacular, calling upon all the persons having claims against such talukdār or his property, to submit the same in writing to him within six months from the date of the publication of the notice.

(2) Where the Managing Officer is satisfied that any claimant was unable to comply with the notice published under sub-section (1), he may allow his claim to be submitted at any time after the date of the expiry of the period fixed therein; but any such claim shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of such period until submission.

representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of section 235 of the Civil Procedure Code (Act XIV of 1882).

Hirachand Harjivandas v. Kasturchand Kasidas (1), explained.

The effect of section 29E of the Gujarát Tálukdár's Act (Bom. Act VI of 1888) is that before the execution of a decree can be proceeded with the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of section 29B of the Gujarát Tálukdár's Act (Bom. Act VI of 1888) it may then proceed with the execution.

The expression 'managing officer' in section 29E of the Act is merely a compendious term for "the Tálukdári Settlement Officer or any other officer appointed by Government to take charge of the Tálukdár's estate and keep the same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Tálukdári Settlement Officer, the 'managing officer' is merely a synonym for 'Tálukdári Settlement Officer.'

(3) Every claim against such tálukdár or his property (other than a claim on the part of Government) not submitted to the Managing Officer in compliance with the notice published under sub-section (1), or allowed to be submitted under sub-section (2), shall, save in the cases provided for by section 29F, sub-section (2), clause (c) and by sections 7 and 13 of the Indian Limitation Act, 1877, be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged, unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim, it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1).

29E. (1) On the publication of a notice under section 29B, sub-section (1), no proceeding in execution of any decree against the tálukdár whose estate is taken under management or his property shall be instituted or continued until the decree-holder files a certificate from the managing officer that the decree-claim has been duly submitted, or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate, accompanied by a certified copy of the decree.

(2) Any person holding a decree against such tálukdár or his property shall be entitled to receive from the Managing Officer, free of cost, the certificate required by sub-section (1).

(3) * * * * *

(1) (1893) 18 Bom. 224.

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Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Tálukdári Settlement Officer, it amounts to a submission of the claim in writing within the meaning of section 29B of the Act, if the Tálukdári Settlement Officer is also the managing officer.

FIRST appeal against the decision of Chunilal Lallubhai, First Class Subordinate Judge of Ahmedabad, in an execution proceeding, Darkhast No. 549 of 1896.

One Girdharlal Hargovan filed a suit, No. 63 of 1893, in the Court of the First Class Subordinate Judge of Ahmedabad to recover on the mortgage of the Bhatkonda Táluka the sum of Rs. 8,935 from Thakore Hiraji Dolatsang and his four co-sharer Tálukdárs of the Bhatkonda Táluka in the Ahmedabad District. The Subordinate Judge dismissed the suit. On Appeal, No. 14 of 1894, the High Court, on the 26th August 1895, reversed the decree and allowed the plaintiff's claim. By consent of parties the High Court passed a decree against Thakore Hiraji Dolatsang alone.

On the 25th June 1896 the plaintiff Girdharlal presented an application, Darkhast No. 549 of 1896, for the execution of the decree seeking to recover the decretal debt, Rs. 8,935 and costs, Rs. 1,373, in all Rs. 10,308 by sale of the mortgaged property. On the 8th July 1896 the Court passed an order for the sale of the mortgaged property and transferred the execution proceedings to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). The Collector forwarded the proceedings to the Tálukdári Settlement Officer who was invested with the powers of the Collector under the said section.

In the year 1905 the Gujarát Tálukdár's Act (Bom. Act VI of 1888) was amended by Act II of 1905. Under the powers conferred by section 29B, which was added by the amending Act, the Tálukdári Settlement Officer published notices in September 1905 calling upon the creditors of the Bhatkonda estate to submit their claims to him, (as he had already taken up the management of the whole of the Tálukdári estate by a previous notification), within the six months prescribed by the section. In the month of January 1907 and before the expiration of the period of six months from the date of the notification the

judgment-debtor Thakore Hiraji Dolatsang and his son Rajaji Hiraji died leaving them surviving Bai Rajba, widow of Rajaji and daughter-in-law of Hiraji. In the meanwhile, that is, between the date of the notification and the death of the judgment-debtor, the judgment-creditor had presented two applications to the Court for the execution of the decree and those applications were forwarded by the Court to the Tálukdári Settlement Officer with its endorsement that the execution should proceed.

On the 3rd July 1907 the judgment-creditor applied to the Court that Bai Rajba was the legal representative of the deceased judgment-debtor and prayed that the execution proceedings be carried on against her. The Court forwarded this application also to the Tálukdári Settlement Officer who filed it along with the papers relating to the execution of the decree in his office.

On the 5th July 1907 the judgment-creditor, in compliance with the notices published by the Tálukdári Settlement Officer under section 29B of the Gujarát Tálukdár's Act (Bom. Act VI of 1888), submitted his claim to that officer and applied that it may be registered under the section. But the Tálukdári Settlement Officer on the next day rejected the application on the ground that it could not be registered as it was not made within six months of the publication of the notices, and along with the application sent back the whole record of the execution proceedings to the Subordinate Judge.

Being dissatisfied with the order of the Tálukdári Settlement Officer, the judgment-creditor urged objections against it before the Subordinate Judge who dismissed the application for execution on the grounds that the legal representative of the deceased judgment-debtor could not be brought on the record of the existing proceedings and that the application could not be continued as a certificate under section 29E was not produced by the judgment-creditor. The following are extracts from the Subordinate Judge's judgment :—

Now the first point is whether the legal representative of the deceased judgment-debtor Hiraji can be brought on the record in this execution matter. I. L. R. 18 Bom. 224 shows that sections 361 to 372, Civil Procedure Code, do

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not relate to proceedings in execution between the judgment-creditor and judgment-debtor and that the course open to the judgment-creditor is by way of application to execute the decree against the legal representative of the deceased as provided for by section 324 of the Civil Procedure Code. Thus the legal representative of the deceased Hiraji cannot be brought on the record in his darkhast matter and the darkhast cannot proceed, there being no one on the record to represent the deceased's estate. The next question is regarding the certificate. Section 29E of Act VI of 1888 provides :—(1) On the publication of a notice under section 29B, sub-section (1) no proceeding in execution of any decree against the talukdār whose estate is taken under management or his property shall be instituted or continued until the decree-holder files a certificate from the managing officer, that the decree claim has been duly submitted or until the expiration of one month from the date of receipt by the managing officer of a written application for such certificate accompanied by a certified copy of the decree, &c. Thus the production of certificate from the managing officer is necessary for continuance of the darkhast.

* * * * *

The plaintiff's own conduct shows that the estate is under the management of the Talukdāri Settlement Officer and that he had not submitted his claim within six months of the publication of the notice. The certificate sent by this Court when the executive matter was transferred to the Collector cannot be held as submission of the plaintiff's claim within the meaning of section 29B of the Talukdāri Act. The pending of the execution-matter before the Talukdāri Settlement Officer also cannot form any excuse for not submitting the claim. The claim is required to be submitted to the Manager and not to the agent of the Collector executing the decree. Thus the pending of the darkhast before the Talukdāri Settlement Officer cannot excuse the plaintiff and the darkhast cannot be continued without the managing officer's certificate. The managing officer did not allow the plaintiff's claim to be submitted after the expiration of six months. Under section 29B (2) of the Talukdāri Act no suit or proceeding is instituted by the plaintiff in respect of the claim not allowed to be submitted by the managing officer and I do not think I am justified in deciding the question as to the inability of the plaintiff to comply with the notice.

The judgment-creditor appealed.

L. A. Shah for the appellant (judgment-creditor).—The Subordinate Judge has held that as the judgment-debtor died after the application for execution was presented and proceedings in execution had commenced, the proceedings could not be continued against his legal representative relying on the ruling in *Hirachand v. Kasturchand*⁽¹⁾. But the effect of that ruling

(1) (1893) 18 Bom. 224.

has been misunderstood. The proceedings can be continued against the legal representative and the name of the legal representative is not required by law to be brought on the record. Sections 361 to 372 have been held not to apply to execution proceedings. Section 234 of the Civil Procedure Code gives the right to continue the proceedings against the legal representative: *Hirachand Harjivandas v. Kasturchand Kasidas*⁽¹⁾, *Jeshankar v. Pandya Fulia*⁽²⁾.

After the execution proceedings were transferred to the Talukdári Settlement Officer under section 320 of the Civil Procedure Code, the Gujarát Talukdár's Act was amended in 1905 by Act II of 1905, so that when sections 29A to 29E added by the amending Act, came into force, the proceedings were pending before him and he had notice of our claim; so, no further submission was necessary. We further rely on two applications made by us to the First Class Subordinate Judge which were duly forwarded by him to the Talukdári Settlement Officer before the expiry of the six months from the date of the notifications. On coming to know of the notifications we made an application as required by section 29B but the Settlement Officer rejected it as beyond time. An issue was raised in the lower Court as to whether there was sufficient excuse for the delay, but no finding was recorded on the issue. We submit that our claim was already before the Talukdári Settlement Officer by reason of the execution proceedings pending before him at the date of the notifications and the two applications mentioned above were a sufficient compliance with requirements of section 29B. That section does not require the submission to be made in any particular form.

In the present case the Talukdári Settlement Officer was himself the Managing Officer referred to in section 29B. Even as Talukdári Settlement Officer he had to manage the estate and he had already taken up the management. Though the designations are different, the two capacities were merged in the same individual and our claim was lying before him either as Managing

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(1) (1899) 18 Bom. 224.

(2) (1930) 2 Bom. L. R. 887.

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Officer or Tálukdári Settlement Officer. We rely on *Purshottam v. Harbhamji*⁽¹⁾.

Coyaji with *R. W. Desai* for the respondent (legal representative of the deceased judgment-debtor).—Section 234 of the Civil Procedure Code under which the case was decided contemplates a fresh application to be made by the judgment-creditor when the judgment-debtor is dead and the decree is sought to be executed against his legal representative. No such application was made in the present case. The judgment-creditor sought to continue the same proceeding against the legal representative by having recourse to the provisions of sections 361 and 372 of the Civil Procedure Code. This could not be allowed. The ruling in *Hirachand Harjivandas v. Kasturchand Kasidas*⁽²⁾ shows that those two sections do not relate to proceedings in execution. The language of section 234 shows that the application must be made to the Court which passed the decree and not to the Court executing the decree. The ruling in *Jeshankar v. Pandya Fulia*⁽³⁾ has reference to a judgment-creditor and not to a judgment-debtor.

It was argued that as the proceedings were already pending before the Tálukdári Settlement Officer, no further submission was necessary. This argument is based upon an assumption that when the amending Act was passed or when the notifications were issued the proceedings were lying before the Talukdári Settlement Officer. About that time all the papers in the case were either in the Courts at Ahmedabad or in the High Court in connection with the litigation relating to the *quantum* of the judgment-debtor's share. The two applications relied on were made after the notice was issued under section 29B, so they cannot affect the case.

It is only an accident that the Tálukdári Settlement Officer happened to be the Managing Officer. Under section 230 of the Civil Procedure Code several matters are sent to the Tálukdári Settlement Officer for execution. The duty of the Managing Officer is a branch of the work of the Settlement Officer. It

(1) (1909) 33 Bom. 443.

(2) (1893) 18 Bom. 224.

(3) (1900) 2 Bom. L. R. 887.

cannot be expected that whenever proceedings are sent to him under the Civil Procedure Code, he should at once make inquiries and find out whether such proceedings refer to any managed estates and see whether they amount to notice.

Under section 29E the execution proceedings can neither be commenced or continued without a certificate from the Managing Officer. If any proceeding is sent to him under section 320 of the Civil Procedure Code, he would return it to the Court and the decree-holder must produce a certificate. In the absence of such certificate, the execution cannot even continue.

Shah in reply.

SCOTT, C. J.:—The appellant applied to the First Class Subordinate Judge for the disposal of an application for execution of a decree obtained by him so long ago as the 26th of August 1895. The application for execution was made on the 25th of June 1896. The mode in which the assistance of the Court was sought was by sale of the right title and interest of the mortgagor in the mortgaged property which was the subject of the suit. On the 8th of July 1896 an order for sale having been passed the proceedings were transferred to the Collector for execution under section 320 of the Code and by him to the Talukdari Settlement Officer upon whom the powers of the Collector under that section had been conferred. The judgment-debtor was a Talukdar having a small share in a Talukdari estate, and it was in order to have that share realised by sale that the application had been made for execution.

In the month of September 1905, under the provisions of the Gujarat Talukdars Act (Bombay Act VI of 1888), section 29B, a Notification was issued stating that the whole of the Talukdari estate had been taken into the management of the Talukdari Settlement Officer and that persons having claims upon Talukdars or their property should submit the same in writing to the Talukdari Settlement Officer. Previous to the date of that Notification the Talukdari Settlement Officer had taken the estate into his management under the provisions of section 28 (2) of the Act. Before six months had expired from the date of the Notification under section 29B, the judgment-debtor died. The date of his

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death was 21st January 1907. Between the date of the Notification and the date of the death of the judgment-debtor two applications were made to the Court by the judgment-creditor that the execution of the decree might be carried out, and those applications were forwarded by the Court to the Talukdari Settlement Officer with endorsements directing that the execution should proceed.

On the 3rd of July 1907, the plaintiff applied to the Court stating that the present respondent was the legal representative of the deceased judgment-debtor and praying that execution might be proceeded with against her. That application was forwarded by the Court to the Talukdari Settlement Officer and was filed by him in the file of documents relating to the execution of the decree in his office.

On the 5th of July 1907 the plaintiff applied to the Talukdari Settlement Officer to have the claim registered under section 29B of the Act, but the Talukdari Settlement Officer replied the following day that the claim could not be registered as it was not made within six months of the publication of the notice under section 29B. Having come to this conclusion that Officer returned the whole of the documents filed by him to the Subordinate Judge stating that under the provisions of section 29B the claim of the judgment-creditor must be deemed to have been satisfied, and that therefore nothing more could be done under the execution proceeding.

The plaintiff objecting to that decision of the Talukdari Settlement Officer complained to the Subordinate Judge.

The Subordinate Judge has held that the plaintiff cannot succeed in his application for two reasons: first, because, the application cannot be proceeded with as the judgment debtor is dead: and secondly, because, no certificate under section 29E of the Talukdars Act has been filed.

As regards the first point, the conclusion arrived at by the Subordinate Judge is stated by him to be based upon the authority of the case of *Hirachand Harjivandas v. Kasturchand Kasidas*.⁽¹⁾ When that case is examined it will be found that it is

no authority for the conclusion arrived at by the learned Judge. It decides that sections 361 to 372, Civil Procedure Code, do not relate to proceedings in execution, and that therefore it is not necessary that the records of the suit should be amended on the death of the defendant after decree, but it also shows that where the judgment-debtor dies after decree the proper course is to apply under section 231 to the Court which passed the decree for liberty to continue the execution proceedings against the legal representative of the judgment-debtor. This is exactly the course which had been followed by the plaintiff in the present case by his application of the 31d July 1907.

No authority has been cited to us in support of the contention that execution proceedings already commenced cannot be continued after the death of the judgment-debtor by substitution of the name of the legal representative in place of that of the judgment-debtor in the application for execution.

We think therefore that there is no objection to the continuance of the execution proceeding against the present respondent without fresh application under section 235.

The second point upon which the Subordinate Judge came to a decision adverse to the appellant is the point based upon the fact that no certificate of the managing officer such as is contemplated under section 29E of the Talukdar's Act has been filed in the Court.

This section provides that before execution can be proceeded with, one of two things must have happened; either a certificate from the managing officer that the claim has been duly submitted must be filed, or one month must have elapsed from the date of receipt by the managing officer of the written application for such certificate accompanied by a certified copy of the decree.

One of the points which was made on behalf of the respondent in supporting the judgment of the lower Court was that the managing officer mentioned in section 29E is a different officer from the Talukdari Settlement Officer who has the charge of the proceedings in execution and therefore a claim which came to his knowledge as the officer charged with the execution of the decree would not be within his knowledge as managing officer. The

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"managing officer" is however merely a compendious term used in the Act for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar's estate and keep the same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer, the "managing officer" is merely a synonym for "Talukdari Settlement Officer."

It was next contended on behalf of the respondent that section 29E gives to the officer, whether he be the managing officer, as distinct from the Talukdari Settlement Officer, or to the Talukdari Settlement Officer, the sole right of deciding whether or not a claim has been duly submitted in reply to a notice issued under section 29B.

As the result of the non-submission of the claim would be a statutory discharge under section 29B (3) of the claim of the decree-holder, if such a power were put into the hands of the officer whose duty it is to manage the estate and free it from its liabilities, it would have the effect of making that officer a judge in his own cause. This is a result which can hardly have been intended by the legislature, and we think, therefore, that section 29E must mean that before execution of a decree can be proceeded with the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If, however, he does not certify that it has been duly submitted the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that a claim has been duly submitted in accordance with the provisions of section 29B, it may then proceed with the execution. The section cannot mean that a decree-holder without making any attempt to submit a claim may apply to the managing officer for a certificate that he has submitted a claim and after waiting a month may go to Court and demand execution of his decree. The construction which we put upon the section is one which attributes to the legislature both fairness and common sense.

The next question which we will consider is, whether in the present case a claim has been submitted to the Talukdari

Settlement Officer in accordance with the provisions of section 29B. That section provides that the officer may call upon persons having claims to submit the same in writing to him within six months from the date of the publication of notice. The group of sections to which it belongs provides machinery for the ascertainment of the liabilities of Talukdars whose estates are taken under management.

It is not contended that the officer has issued any requisition under section 29C, therefore all that the plaintiff must show is that he has within six months submitted his claim in writing.

Now we know that the plaintiff's claim for execution of the decree has actually been before the Talukdari Settlement Officer from the month of July 1896, that is to say, for a period of 13 years, and we know that two written applications were made by the plaintiff within six months of the date of the issue of the Notification under section 29B, and were in the ordinary course of execution proceedings forwarded by the Subordinate Judge to the Talukdari Settlement Officer. It is contended on behalf of the plaintiff that either of those applications is a written notice of the claim.

No form of Notification of claim is prescribed by the Act, and as the only object aimed at by the legislature is that the officer should be informed of claim against the estate, there is no reason why any written notice of claim, which is submitted to the managing officer should not be held to comply with the requirements of the section.

In our opinion the applications, dated the 6th October 1906 and the 22nd of December 1903, are sufficient notices in writing of the plaintiff's claim.

The plaintiff, although he has thus satisfied us that he has submitted notice in writing of his claim in compliance with the provisions of section 29B, has not been able to show us that he has obtained a certificate from the officer or has applied for one more than a month before the date of his application to the Court. We think that we ought to give him an opportunity, now, of applying for a certificate from the managing officer, and we think that having satisfied us that a claim has been made

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under section 29B, he will be entitled to receive a certificate from that officer. If, however, he does not receive it we direct the Subordinate Judge, after the expiry of one month from the date of the application for certificate, to proceed with the execution of the decree.

We reverse the order of the lower Court and send back the case for disposal in accordance with this judgment.

We think there ought to be no costs of this appeal as the appellant has not produced the certificate and the respondent has failed in his contentions.

The other costs will be costs in the execution.

Order reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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CHHAGANLAL BHAGWANDAS (ORIGINAL OPPONENT No. 2), APPELLANT,
v. PRANJIVAN SHIVLAL AND OTHERS (ORIGINAL PETITIONERS AND
HEIRS OF ORIGINAL PLAINTIFF), RESPONDENTS.*

THE COLLECTOR OF SURAT (ORIGINAL OPPONENT No. 1), APPELLANT, v.
PRANJIVANDAS SHIVLAL AND OTHERS (ORIGINAL PETITIONERS),
RESPONDENTS.*

*Pensions Act (XXIII of 1871), sections 6, 8, 11—Toda giras allowance—
Purchase of the rights to receive allowance at a Court sale—The allowance
entered in the name of the purchaser—Application by heirs of the purchaser
to receive arrears of allowance—Certificate of Collector.*

It was directed by a decree that the purchaser at a Court sale of a Toda Giras allowance should recover from the Collector the amount due for arrears of the allowance from the date of his purchase. An application to execute this decree was made in 1864, in consequence of which the decree-holder's name was entered in the Collector's books as the person entitled to the allowance in question, and the arrears up to 1864 were paid. In 1903, the decree-holder's heirs applied to the Court to recover the arrears of allowance that had remained unpaid since 1896. The Collector contended that the application could not be entertained in the absence of a certificate from the Collector under the provisions of section 6 of the Pensions Act, 1871.

* Joint Appeals Nos. 70 and 107 of 1903.

Held, overruling the contention, that the power of the Collector under the Act had been exhausted and there was no discretion for that officer to exercise either under the Act or the rules, so far as the applicant's right to recover the arrears that had become due in the life-time of the last holder, was concerned,

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Held, further, that if those amounts remained unpaid, the Collector held them for and on behalf of the last holder, as moneys due to him, and as moneys therefore recoverable on his death by his heirs independently of any question which might arise under the Pensions Act 1871, or the rules framed thereunder.

APPEAL from the decision of Dayaram Gidumal, District Judge of Surat.

Execution proceedings.

The decree sought to be executed was passed on the 22nd February 1860 by the Judicial Committee of the Privy Council. The judgment is reported in 8 Moore's I. A., p. 1.

A money decree was passed against one Utodia Bharmalsingji Kooversingjee, who was entitled to two annual Toda Giras allowances. In execution of this decree the allowances were put up to sale at a Court auction and purchased by Shambhulal Girdharlal on the 24th December 1839. Under the deeds of sale, the purchaser was to receive every year the amounts of the said Giras from the Government Treasury and no one was to object thereto.

Shambhulal Girdharlal then tried to get the payments made to himself, but failed. Eventually he filed a suit in 1843 against the Collector of Surat, whereby he prayed (*inter alia*) that the Collector might be ordered to enter the said Giras allowance in the plaintiff's name and pay over to him the arrears thereof. The case was finally decided in the Privy Council. The decree directed, among other things, that—

"All the moneys which have been paid into the Zillah Court of Surat, or the Sudder Dewanee Adalat by the respondent, the Collector of Surat, or by the Government on his behalf on account of the Toda Giras payable from Purgunna Olpad, together with all accumulations thereof ought to be paid or transferred to the appellant and in case no such payments shall have been made into the Zillah Court of Surat or the Sudder Dewanee Adalat on such account, then that the Collector of Surat ought to be ordered to pay forthwith to the said appellant the amount due for arrears of the said Toda Giras

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from the time of the purchase thereof by him, together with simple interest thereon according to the usual rate allowed by the said Court."

Shambhulal having died, his son Lalbhai, the manager of his firm, applied in 1864 to recover the arrears of the Toda Giras allowance. The arrears up to 1864 were paid to him and Lalbhai's name was entered as the person entitled to the Toda Giras.

To recover further arrears, Lalbhai applied again and recovered them up to 1895.

Lalbhai died in 1895. At his death, the Collector entered the name of his son Bhagwandas; but the latter also died and further arrears remained unpaid.

In 1903, the surviving members of Shambhulal's firm applied to the Court to recover the arrears of the allowance from 1896 to 1902. They also prayed that their names should be entered as the persons entitled to the allowance.

This application was resisted by the Collector of Surat who contended *inter alia* that the applicants were not entitled to prefer the application in the absence of a certificate under the Pensions Act 1871.

The District Judge overruled the contentions set up by the Collector and ordered payment into Court as follows:—

(1) of Rs. 2,429 plus $\frac{1}{2}$ of 791-3-10 (arrears of the allowance from 1896—1902);

(2) of the amounts due for the Hak after 1902 with interest up to the date of the order: and

(3) of the amounts that might become annually payable after the date of the order.

The opponents appealed to the High Court.

G. S. Rao, Acting Government Pleader, for the appellants (opponents).

Branson (with M. N. Mehta) for the respondents (applicants).

CHANDAYARKAR, J.—The first point argued in support of these appeals is that the order of the District Judge, directing the Collector to pay the amount mentioned in the *darkhast* into Court is not sustainable, having regard to the Pensions Act and

the rules framed under it. This argument rests upon a misapprehension of the nature of the liability of the Collector, which is in dispute, and of the payment into Court which he has been directed to make. It is admitted before us, and, indeed, the Court below has found upon unchallenged evidence, that the amount, which is named by the applicants in the present *darkhast*, had become payable to the deceased Bhagvandas during his life-time, because he had been recognized as holder of the Hak by the Collector under the Pensions Act. The power of the Collector under the rules framed under the Act had been exhausted, and there was no discretion for that officer to exercise, either under the Act or the rules, so far as Bhagvandas' right to receive the allowance for the years in dispute was concerned. If the amounts somehow remained unpaid, the Collector held them for him and on his behalf, as monies due to him, and as monies therefore recoverable on his death by his heirs, independently of any question arising under the Pensions Act or the rules under it.

The District Judge has gone beyond the *darkhast* in making an order in his decree as regards the amounts that may become annually payable after the date of his order. The question was not raised, and indeed could not be raised, by the present *darkhast*, with reference to these amounts. They stand upon a footing different from that of the arrears claimed in the *darkhast*. Presumably and indeed probably these amounts payable *in future* would be recoverable on Bhagvandas' death by the person recognised by the Collector according to law. Whether that is so or not we do not decide, but that is a question which cannot be decided unless it arises actually for adjudication. This direction in the decree ought to be struck out.

The order as to interest cannot be interfered with, because there can be no doubt that the amount was wrongly withheld. As to the rate of interest, that is entirely a matter of discretion.

The learned Government Pleader also addressed us on a question as regards the rights of the co-sharers *inter se* with reference to the amount which the District Judge has directed to be paid into Court. The District Judge has merely directed the payment of the amount into Court without deciding the rights of the

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claimants and their co-sharers *inter se*. The question as to what is to become of that amount after payment into Court has been made, that is, to what particular person it is to be paid, has yet to be decided. Therefore we say nothing upon that point. The decree will be modified by striking out the portion relating to amounts that may become annually payable. In other respects it is confirmed. Each party will bear his own costs of this appeal.

The same order governs First Appeal No. 107 of 1906.

Decree modified.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1903.
September 27.

NAVLAJI SARDARMAL (ORIGINAL DEFENDANT), APPELLANT, v. RAMA DHONDI (ORIGINAL PLAINTIFF), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15D, clause (3) (1) — Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in appeal—Decree in the suit—Interpretation.

In a suit for an account brought by a mortgagor under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the Court found that a

* Second Appeal No. 38 of 1909.

(1) Section 15D, clauses (1), (2) and (3) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) run as follow :—

15 D. (1) Any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount.

(2) When any such suit is brought the amount (if any) remaining unpaid shall be determined under the same rules as would be applicable under this Act if the mortgagee had sued for the recovery of the debt.

(3) At any time before the decree in the suit is signed, the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage, or the mortgagee, if he would then have been entitled to sue for foreclosure or sale, may apply to the Court to pass a decree for foreclosure or sale (as the case may be), instead of a decree merely declaring the amount remaining unpaid, and the Court may, if it thinks fit, grant the application.

sum of Rs. 100 was due by the plaintiff to the defendant. The defendant appealed. The appellate Court, on the plaintiff's application that his suit should be treated as one for redemption, passed a decree for redemption on payment of Rs. 49-2-0 by the plaintiff to the defendant.

The defendant preferred a second appeal contending that the words "the decree in the suit" in section 15D, clause (3) of the Act meant decree in the original Court and not of the Court of Appeal.

Held, dismissing the second appeal, that when the decree of the lower Court is reversed or varied in appeal, the decree of the appellate Court becomes the decree in the suit which is to be executed in execution proceedings.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Nasik with appellate powers, varying the decree passed by V. D. Joglekar, Subordinate Judge of Pimpalgaum.

The plaintiff sued under the provisions of section 15D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) for an account of the amount due on a registered mortgage bond for Rs. 160, dated the 3rd April 1897.

The defence was that the profits of the land were not sufficient to cover even the interest due on the principal.

The Subordinate Judge took the account and found that Rs. 100 were due by the plaintiff to the defendant under the mortgage. He, therefore, made a declaration accordingly.

The defendant appealed and at the hearing of the appeal, the plaintiff (the present respondent) applied to the Court that his suit should be treated as one for redemption and a decree should be passed for the redemption of the mortgaged property. The appellate Court granted the application and passed a decree in the following terms :—

The decree of the Lower Court is varied and it is hereby directed that the plaintiff do pay to the defendant Rs. 49-2-0 (forty-nine rupees and two annas) and his costs in both the Courts on 12th April 1909 and the defendant do deliver possession of the plaint lands to the plaintiff on the date aforesaid, free from all incumbrances, that the defendant do deliver such documents as he may have relating to the lands, that in default of the plaintiff making the payment on the due date, the defendant may apply for a proper order under paragraph 2 of section 15B of the Dekkhan Agriculturists' Relief Act, that

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the sum of Rs. 49-2 0 shall bear interest at 12 per cent from 13th April 1909 till satisfaction and the defendant shall be liable to render accounts of the profits, &c, till delivery of possession. The plaintiff (respondent) bears his costs throughout

Defendant preferred a second appeal.

R. R. Desai for the appellant (defendant):—This was originally a suit for account under section 15D, clause (1) of the Dekkhan Agriculturists' Relief Act and the amount due under the account was declared by the first Court in its decree. The plaintiff was satisfied with that decree and he did not appeal against it, nor did he present an application to the first Court under section 15D, clause (3) of the Act. The words in the clause are specific—"before the decree in the suit is signed" which cannot mean a decree in appeal.

[BATCHELOR, J.:—What benefit is there to the defendant whether the decree for redemption is passed in the present suit or in some other suit?]

Under the Act the defendant is not liable for the surplus profits and if he continues in possession until the result of a separate suit he will be benefitted to the extent of the profits which he will get till then. We want to take advantage of this peculiarity though it may be apparently unfair.

M. R. Bodas for the respondent (plaintiff):—The words "the decree in the suit" in clause 3 of section 15 D of the Dekkhan Agriculturists' Relief Act do include the decree of the appellate Court because an appeal is a continuation of the suit. Those words mean any final decree whether of the first Court or of the appellate Court.

SCOTT, C. J.:—The only point which we are called upon to decide in this appeal is whether the learned Judge of the appellate Court was right in passing a redemption decree for the plaintiff on his application when the case came before him in appeal.

It is argued on behalf of the appellant that the words of section 15D, clause (3) of the Dekkhan Agriculturists' Relief Act are only susceptible of the interpretation which he contends for, namely, that "the decree in the suit" means the

decree of the original Court and not of the Court of appeal. It would follow that if the Court of appeal reversed the decree of the lower Court and passed an entirely new decree it would not be "the decree in the suit" though it would be the only existing decree capable of execution. If the words had been "a decree" there would have been more force in the argument. When the decree of the lower Court is reversed in appeal, or varied in appeal, the decree of the lower appellate Court becomes the decree in the suit which is to be executed in execution proceedings. We, therefore, think that the learned Judge of the lower Court acted within his powers in granting the application of the plaintiff for a decree for redemption.

We dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

SHANKAR RAMKRISHNA CHOLKAR (ORIGINAL PLAINTIFF), APPELLANT,
v. KRISHNAJI GANESH BADE AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS *

1909.

September 28.

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 2, clause 2(1)—
Amending Act (XXIII of 1881)—Ratnâgiri District—Mortgage of 1881—
Suit for account—Agriculturist.*

The plaintiff whose land and residence was in Ratnâgiri District executed a mortgage in the year 1881. The Dekkhan Agriculturists' Relief Act (XVII

* First Appeal No. 106 of 1908

(1) Section 2, clause 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) runs as follows —

2. In construing this Act, unless there is something repugnant in the subject or context, the following rules shall be observed namely:

1st * * * * *

Second.—In Chapters II, III, IV and VI, and in section 69, the term "Agriculturist," when used with reference to any suit or proceeding, shall include a person, who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law.

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of 1879) which extended to the districts of Poona, Sátára, Sholápur and Ahmednagar, was not applicable to the Ratnágiri District in the year 1881. In the year 1896 the plaintiff brought a suit for an account of what was due on the mortgage under the provisions of section 15 (D) of the Act (XVII of 1879) and contended that he was an agriculturist in 1881, that is, when the liability under the mortgage was incurred.

Held that the plaintiff could not sue under section 15D of the Act (XVII of 1879) as he was not an agriculturist within the meaning of the Amending Act (XXIII of 1881).

The expression "then defined by law" in section 2, clause 2 of the Act (XVII of 1879) relates to the time when any part of the liability was incurred.

FIRST appeal from the decision of V. N. Rahuikar, First Class Subordinate Judge of Ratnágiri, in Suit No. 108 of 1906.

The plaintiff, who alleged himself to be an agriculturist within the meaning of section 2, clause 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), brought the present suit under section 15D of the Act for an account of seven mortgages ranging from the year 1835 to 1881. The first six mortgages were passed by the ancestors of the plaintiff and the seventh was passed by the plaintiff himself on the 4th November 1881. The plaintiff alleged that he was an agriculturist both when he executed the last mortgage and when the suit was instituted in 1906.

The defendants' creditors denied the plaintiff's status as an agriculturist.

The Subordinate Judge found that the plaintiff was not an agriculturist either at the time of the suit or at the time when the liability was incurred within the meaning of section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He, therefore, dismissed the suit as the same could not be entertained under section 15D of the Act. The following were his reasons:—

In determining the status the income of the family must be taken into consideration. The non-agricultural income derived by the family is Rs. 720 a year and the agricultural income is Rs. 165. The principal source of livelihood at the time of the suit was evidently other than agriculture. Plaintiff was not an agriculturist at the institution of the suit. It is contended that the plaintiff can come in under clause 2 of section 2 of the Dekkhan Agriculturists' Relief

Act and was an agriculturist at the time when the liability was incurred, *i. e.*, at the time of the mortgage of the 4th November 1881.

The suit for account under section 15D falls under Chapter III. It is one of the suits referred to in clause 2 of section 2. The term agriculturist when used with reference to such a suit includes a person, who, when any part of the liability, which forms the subject of the suit, was incurred, was an agriculturist within the meaning of that word *as then defined by law*.

The term 'agriculturist' has undergone several changes. It was by Act XXII of 1882 that the person, who was an agriculturist at the time when the liability was incurred, was included in the term 'agriculturist'. The person had to establish his status of an agriculturist as defined by that Act. If a person incurred a liability in 1880 he had to prove that he came within the definition given in the Act of 1882. To avoid the inconveniences and hardship the present wording was introduced in 1895 by Act VI of 1895. The words "within the meaning of that word as then defined by law" were substituted for the words "as defined in the first rule". Thus if a liability was incurred in 1880 the status in 1880 could be established according to the definition given in the Dekkhan Agriculturists' Relief Act in force in that year and not in the year of suit.

From the history of the use of the words "as then defined by law" at the end of clause 2 it is evident that by 'law' is meant the Dekkhan Agriculturists' Relief Act and not any other Act.

On the date of the mortgage of 1881 the Dekkhan Agriculturists' Relief Act as amended by Act XXIII of 1881 was in force in the four districts of Poona, Sátara, Sholapur and Nagar. An agriculturist within the meaning of that Act must have earned his livelihood by agriculture carried on within the limits of the said four districts. Plaintiff did not carry on agriculture in any one of the said four districts. He cannot therefore come in under clause 2 of section 2 of the Dekkhan Agriculturists' Relief Act. The result of this construction is that a person residing outside the four said districts and wishing to come in under clause 2 must have incurred the liability subsequently to the extension of the Dekkhan Agriculturists' Relief Act to his district. Plaintiff carried on agriculture in Ratnagiri District to which a part of the Act was extended in 1905. He cannot come under clause 2 and consequently was not an agriculturist at the time when the liability was incurred within the meaning of section 2.

The plaintiff appealed.

D. A. Khare for the appellant (plaintiff).—The lower Court erred in holding that we are not agriculturist. We are agriculturist now. Our income from agriculture exceeds our income derived from other sources. We were agriculturist when the mortgage of 1881 was executed. No doubt when the mortgage

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liability was incurred the Dekkhan Agriculturists' Relief Act was not in force in the Ratnagiri District but it is clear from the language of section 1 of the Act that the provisions of sub-section 2 of clause (b) of section 2 will cover the present case. The ruling in *Mahadev Narayan v. Vinayak Gangadhar*⁽¹⁾ does not apply. That case was from the Poona District in which the Act came into force in 1879 and the liability was incurred prior to the passing of the Act.

P. B. Shingne for respondents 1, 3, 7 and 8 (defendants 1, 3, 7 and 8); and

P. D. Bhide for respondents 2, 4, 11 and 13 (defendants 2, 4, 11 and 13) were not called upon.

SCOTT, C. J.:—[His Lordship, after dwelling on another part of the case not material to this report, continued :—]

It is said that, at all events, with regard to one of the mortgages in suit, namely, that executed in the year 1881, the plaintiff is entitled to maintain this suit because the second clause of section 2 of the Dekkhan Agriculturists' Relief Act provides that "the term 'agriculturist' when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the meaning of that word as then defined by law." "Then defined by law" relates to the time 'when' any part of the liability was incurred. We, therefore, have to look to the definition of the word 'agriculturist' in the year 1881, the date of the mortgage in question.

"Agriculturist" by Act XXIII of 1881 amending the principal Act was defined to be "a person who, when or after incurring any liability, the subject of any proceeding under this Act, by himself, his servants or tenants earned or earns his livelihood, wholly or partially, by agriculture carried on within the limits of the said districts." In order to ascertain what is meant by 'the said districts' we turn to section 1 of the Act which in the year 1881 provided that the rest of the Act extends only to the districts of Poona, Satara, Sholapur and Ahmednagar. It follows

(1) (1909) 33 Bom. 504.

that the plaintiff whose land and whose residence was in Ratnágiri was not an agriculturist within the meaning of Act XXIII of 1881.

For these reasons we affirm the decree of the lower Court and dismiss this appeal with costs. Only one set of costs.

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Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

PILU BIN APPA NALVADE (ORIGINAL PLAINTIFF), APPELLANT, v.
BABAJI BIN NARU MANG AND ANOTHER (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1909.
October 1.

*Hindu Law—Alienation by widow—Consent by the body of reversioners—
Transfer for legal necessity—Transaction for consideration—Gift—Partial
relinquishment by widow.*

The general principle which prohibits a Hindu widow's alienation of immovable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity.

Bajrangi Singh v. Manokarnika Bakhs Singh⁽¹⁾ and *Vinayak v. Govind*⁽²⁾ followed.

The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate.

SECOND appeal from the decision of C. Roper, District Judge of Sátára, confirming the decree of V. V. Tilak, First Class Subordinate Judge of Sátára.

* Second Appeal No. 183 of 1909.

(1) (1907) 30 All. 1.

(2) (1900) 25 Bom. 129.

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One Appa Nalvade died in the year 1899 leaving him surviving two widows Kondai and Chima, and Tanu, daughter by Chima. Tanu had a son Narayan and a daughter Mukta. In the year 1903 the two widows made a gift of four-fifths of their husband's property to Tanu and retained one-fifth for their maintenance. Tanu's son Narayan consented to the gift. After the gift Chima died during the same year. In the year 1904 Tanu mortgaged the property given in gift to her to Babaji bin Naru Mang to defray the expenses of legal proceedings instituted by the present plaintiff, the son of a separated nephew of Appa, for obtaining a succession certificate on the ground that he was adopted by Appa. The widows denied the adoption and the plaintiff's attempt to obtain the succession certificate failed. In October 1904, Kondai, the surviving widow, adopted the plaintiff who in June 1907 instituted the present suit to recover possession of the property, the subject of the gift to Tanu. The suit was brought against the mortgagee Babaji bin Naru as defendant 1 and against Tanu as defendant 2. The plaintiff alleged that he had been in possession of the property as owner but that defendant 1 as mortgagee of defendant 2 had brought a possessory suit against him and dispossessed him in October 1906.

Defendant 1 set up his title as mortgagee in possession under defendant 2.

Defendant 2 denied the plaintiff's title and possession and contended that the plaintiff's adoption was illegal inasmuch as Kondai had no authority to adopt. She further asserted her ownership under the gift by Kondai and Chima.

The Subordinate Judge found that the plaintiff was the legally adopted son of Appa but he was not entitled to the property. The suit was therefore dismissed on the following grounds:—

It will be observed that plaintiff's adoption took place after the gift to defendant 2 and after the mortgage to defendant 1. The defendant 2 is in possession through defendant 1 of the land in dispute if not of any other property comprised in the gift and the question is whether plaintiff is entitled to set aside the gift.

Although a son when adopted by a widow enters at once into the full right of a natural born son, his rights cannot relate back to any earlier period, that is

to say, they do not relate back to the death of the adoptive father Mayne, 7th edition, p. 259, and I. L. R. 5 Bombay 630.

An adopted son is bound by an alienation made by his adoptive mother before his adoption with the consent of persons who, at the time of such alienation, were the next heirs and competent to give validity to the transaction. Mayne, 7th edition, pages 260, 857 and 858, I. L. R. 25 Bombay 129, and 9 Bombay Law Reporter, p. 1348.

The alienation in the present case is a gift made not to a stranger but to a daughter, who was the next reversionary heir, and the consent of the daughter's son was, I think enough, there being no other member of the family likely to be interested in disputing the transaction.

On appeal by the plaintiff the District Judge confirmed the decree observing:—

The authorities are, I think, quite clear and consistent, Mr. Patwardhan (plaintiff-appellant's pleader) mainly relies on a very recent case reported at 10 Bom. L. R. 1029, but it does not in my opinion avail his client.

It is not disputed that the gift by plaintiff's adoptive mother received the express or implied consent of all persons who were likely to dispute the transaction. The donee was defendant No. 2, the daughter of Appa, to whom plaintiff was adopted.

On the demise of plaintiff's adoptive mother, Appa's estate would in the ordinary course have devolved absolutely on his daughter. Both the latter and her son have consented to the gift.

Hence no question of necessity arises. See 9 Bombay L. R. 1348. This view is consistent with everything laid down in 10 Bombay L. R. 1029. The widow's estate no doubt terminated on her adopting plaintiff but he is bound by any prior alienation consented to by the reversionary heirs of Appa.

The plaintiff preferred a second appeal.

P. D. Bhide, for the appellant (plaintiff):—The lower Court was wrong in relying on *Bajrangi Singh v. Manokarnika Bakhsh Singh*⁽¹⁾. It does not apply, as in that case there was no adopted son's rights to be considered. The daughter's consent to the alienation was useless: *Varjivan Rangji v. Ghelji Gokaldas*⁽²⁾. The consent of the daughter's son was also useless. He was a reversioner but not the only reversioner as in *Vinayak v. Govind*⁽³⁾.

(1) (1907) 30 All. 1.

(2) (1881) 5 Bom. 563.

(3) (1900) 25 Bom. 129.

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P. B. Shingne, for the respondents (defendants):—The intervention of the adopted son makes no difference. He has to accept alienations made by the adopting widow when they are either necessary or proper: *Collector of Masulipatam v. Cavalry Vencata Narrainapah*⁽¹⁾, *Raj Lukhee Dabea v. Gokool Chunder Chowdhry*⁽²⁾. When the next reversioner consents, the alienation is proper: *Bajrangi Singh v. Manokarnika Bakhs Singh*⁽³⁾. In the present case the daughter's son assented to the gift, hence the ruling in *Varjwan Rungji v. Ghelji Gokaldas*⁽⁴⁾ does not apply. The decision in *Vinayak v. Govind*⁽⁵⁾ does not affect the present case, as here the next reversioner after the daughter had consented to the alienation within the meaning of *Bajrangi Singh v. Manokarnika Bakhs Singh*⁽³⁾. Moreover, there is an acceleration in this case in favour of the next reversioner. The case was therefore properly decided by the lower Court.

BATCHELOR, J.:—In this second appeal the facts are these. One Appa died in or about the year 1833 leaving two widows, Kondai and Chima, and a daughter by Chima, namely, the second defendant. The second defendant has a son, Narayan. In February 1903 the two widows made a deed of gift of four-fifths of their husband's property in favour of the second defendant, reserving the other fifth for their own maintenance. In October 1904 Kondai adopted the plaintiff, who is the son of Appa's separated nephew.

The question is whether the plaintiff is bound by the alienation made prior to his adoption. The gift was consented to by the defendant 2, the actual donee, and by her son, Narayan. The Courts below have accepted this consent as a sufficient consent on behalf of the reversioners likely to be interested in disputing the gift, and upon this ground have dismissed plaintiff's suit. But we are of opinion that this ground cannot serve to sustain the decree.

The general principle which prohibits a Hindu widow's alienation of immovable property otherwise than for legal necessity is, no doubt, relaxed in cases where the consent of the whole body

(1) (1861) 8 Moo. I. A. 529.

(3) (1907) 30 All. 1.

(2) (1869) 13 Moo. I. A. 209.

(4) (1881) 5 Bom. 566.

(5) (1900) 25 Bom. 129.

of persons constituting the next reversion has been obtained : see the judgment of the Judicial Committee in *Bajrangi Singh v. Manoharnika Bakhsh Singh*⁽¹⁾, which refers with approval to the decision of this Court in *Vinayak v. Govind*⁽²⁾. Now in *Vinayak's* case the reason of the relaxation, as the law has always been understood in this Presidency, is referred to this principle, that the consent of the persons who would be interested in disputing the transfer, affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity. If that is the reason of the rule, it is clear that its operation must ordinarily be limited to transfers for consideration, and cannot appropriately be extended to voluntary transfers by way of gift, where there is no room for the theory of legal necessity. We may add that we have been referred to no case where the Courts have applied the rule to a gift.

That is one reason why in our opinion the rule upon which the Courts below have relied is inapplicable to the present facts. And upon another ground also it seems to us that this case falls outside the rule. For, whether the consent required be more accurately defined as the consent of the whole body of persons constituting the next reversion, as it was expressed in *Bajrangi's* case, or as the consent of all those persons who would be likely to be interested in disputing the alienation, as it is put in other decisions, it is clear that the requirements of the rule have not been satisfied here. For the only consent which the present defendants can call in aid is that of the second defendant and of her son, Narayan. But the second defendant, in addition to being the actual recipient of the gift, is a Hindu woman, and the presence or absence of her consent is, in the words of Jenkins, C. J., in *Vinayak v. Govind*⁽²⁾ "absolutely immaterial"; nor can the acquiescence of her son carry the defendants' case any further. That being so, it is not possible to hold that we have here the consent of "such kindred, the absence of whose opposition raises a presumption that the alienation was a fair and proper one": that is how the rule was put by Ranade, J., in *Vinayak v. Govind*⁽²⁾ and the passage was cited without disapproval by

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PILU

v.
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(1) (1907) 30 All. 1.

(2) (1900) 25 Bom. 129.

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Sir Andrew Scoble in delivering their Lordships' judgment in *Bajrangi's* case⁽¹⁾. Applying this principle we find that there is nothing in the consent of the second defendant and her son which can properly deprive the plaintiff, another reversioner, of the right to question the alienation.

Then it was sought to save the decree by reference to the rule which allows the Hindu widow to accelerate the succession by relinquishing her own interest to the next reversioner. But here again it appears that an essential condition of the rule is absent in this case, where the widows relinquished only a four-fifths part of the estate. Such a relinquishment does not satisfy the requirements of the rule, which was expressed in the following words by the Privy Council in *Behari Lal v. Madho Lal Ahir Gayarwal*⁽²⁾: "It may be accepted", said Lord Morris, "that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances". Here the retention of the one-fifth part of the estate in the widow's hands takes the case out of the rule, and not the less so because the retention of 1/5th part of the life estate is described as a provision for maintenance. It was suggested by the defendants' pleader that Mr. Justice Chandavarkar's decision in *Hunsraj v. Bai Moghibai*⁽³⁾ proceeded on a different principle, but if that case be examined, we think that it will be found to lend no support to the defendants. For, so far from diverging from the rule in *Behari Lal's* case⁽²⁾, the learned Judge expressly cites that case as his authority, and in conformity with it holds no more than that the widow "can, during her life-time, convey the estate absolutely to him who is the next reversioner". The question, indeed, there was, not whether a partial relinquishment of the estate would be binding on the reversioner, but whether the widow had authority "to convey more than the estate she

(1) (1907) 30 All. 1.

(2) (1891) 19 Cal. 236 at p. 241.

(3) (1905) 7 Bom. L. R. 622.

has"; and that question was decided on the ground that the widow there was bound by the special agreement of which specific performance was sought against her. The decision is, therefore, no authority for extending the carefully guarded rule laid down by the Privy Council to cases where the widow has made only a partial relinquishment of the estate.

For these reasons we reverse the decree of the lower appellate Court and decree the plaintiff's suit with costs throughout.

Decree reversed.

G. B. R.

1909.

PLU
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BABAJI,

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

MAHARANA SHRI DAVLATSINHJI, THAKORE SAHEB OF LIMDI
(ORIGINAL DEFENDANT 1), APPELLANT, v. KHACHAR HAMIR MON
(ORIGINAL PLAINTIFF), RESPONDENT.*

1909.

October 5.

Provincial Small Causes Courts Act (IX of 1887), sections 16, 27, 32, Schedule II, Clauses (2) and (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—Jurisdiction by consent of parties.

A suit for the recovery of Rs. 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes and the decree in such a suit is final under section 27 of the Provincial Small Causes Courts Act (IX of 1887).

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining the appeal. The respondent (plaintiff) urged that a second appeal lay: and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point.

* Second Appeal No. 598 of 1907.

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SINHEJI
(MAHARANA
SHRI)
v.
KHACHAR
HAMIR MON.

Held, that the District Court had no jurisdiction to try the case and the conduct of the parties could not give it jurisdiction.

Ledgard v. Bull⁽¹⁾ and *Meenakshi Naidoo v. Subramaniya Sastri*⁽²⁾ referred to.

Decree of the District Court reversed and that of the first Court restored.

SECOND appeal from the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad, with appellate powers, reversing the decree of C. H. Vakil, Subordinate Judge of Dhandhuka.

The plaintiff sued to recover from the defendants Rs. 12-11-6 representing his share in the various items of the revenue of the village of Khambhada, alleging that some part of the land of the village was mortgaged to defendant 1, Thakore Saheb of Limdi, that the lands in the village were managed by the plaintiff and other sharers jointly with defendant 1, that defendant 1 paid to the plaintiff and other sharers their dues up to Samvat year 1955, paid nothing in Samvat 1956 owing to famine and appropriated all the proceeds for Samvat 1957, and that he had not paid the plaintiff his share

Defendant 1, Thakore Saheb of Limdi, did not admit that the plaintiff had a particular share in the revenue of the village of Khambhada and contended that the land of the village was not mortgaged to him, that the plaintiff had no voice in the management of the lands in the village, that there was misjoinder of parties and causes of action and that the frame of the suit was bad as it was not brought in the name of the state of Limdi.

Defendants 2, 3 and 5 admitted the plaintiff's claim.

Defendants 4, 6—20 were absent though duly served.

Defendants 20—25 were originally plaintiffs but they were afterwards made defendants at their own request.

The Subordinate Judge dismissed the suit.

The plaintiff appealed and the appellate Court found that the frame of the suit was not defective and sent back the case to the Subordinate Judge for fresh findings on the issues involved in

(1886) L. R. 13 L. A. 134.

(2) (1887) L. R. 14 L. A. 160.

the case after admitting on behalf of the plaintiff certain documentary evidence which was originally excluded. On the remand the Subordinate Judge found that the plaintiff's share was proved and certified his findings on the issues to the appellate Court which reversed the decree of the Subordinate Judge and allowed the plaintiff's claim to the extent of Rs. 11-8-0 with costs against defendant 1.

Defendant 1 preferred a second appeal.

G. S. Rao for the appellant (defendant 1).

G. K. Parekh for the respondent (plaintiff).

SCOTT, C. J.—The plaintiff in this case sued the defendant for Rs. 12-11-6 representing his share in the produce of certain immoveable property of the value of Rs. 45-0-9 which was collected and lawfully received by the defendant 1 in the Samvat year 1957 but which in accordance with the practice of previous years it was his duty to distribute partly to the plaintiff.

The case is in all respects similar to that of *Damodar Gopal Dikshit v Chintaman Balkrishna Karve*⁽¹⁾.

It is a suit for money had and received to the plaintiff's use. It does not fall under clause (4), Schedule 2 of Act IX of 1887, in that it is not a suit for possession of immoveable property or for recovery of an interest in such property, nor does it fall within clause (31) because it is not alleged that the produce was unlawfully received by the defendant. That being so the suit was cognizable by the Court of Small Causes.

Section 16 of the Provincial Small Causes Courts Act provides that "save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits."

By section 32 of the same Act it is provided that so much of Chapters III and IV as relates to the exclusion of the jurisdiction of other Courts in suits cognizable by Courts of Small Causes applies to Courts invested by or under any enactment for the

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DAILAT-
SINHJI
(MAHARANA
SHRI)
v.
KHACHAE
HAMIR MON.

⁽¹⁾ (1892) 17 Bom. 42.

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DAYLAT-
SINHJI
(MAHARANA
SHRI)
v.
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HAMIR MON.

time being in force with the jurisdiction of a Court of Small Causes.

The plaint in the present suit was filed in the Court of Second Class Subordinate Judge of Dhandhuka and Gogha who was invested with the jurisdiction of a Judge of the Court of Small Causes. He tried the suit and passed a decree in favour of the defendants. That decree under section 27 of the Provincial Small Causes Courts Act was final.

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad. The Judge remanded the case and after the ren and order had been complied with again entertained the appeal and passed a decree in favour of the plaintiff for Rs. 11-8-0 and costs.

From that decree an appeal was preferred to this Court. But on the appeal coming on for hearing the pleader for the defendants submitted that the decision of the Second Class Subordinate Judge was final under section 27 of the Provincial Small Causes Courts Act, and that therefore the appellate Court of Ahmedabad had acted without jurisdiction in disposing of the appeal and asked that his second appeal might be taken to be an application under section 115 of the Civil Procedure Code in revision.

It has been contended on behalf of the respondent that a second appeal does lie and that it lies by reason of the conduct of the parties, that as the defendants had not objected to the jurisdiction of the Ahmedabad Court in appeal it was too late for them now to take the point that there was no appeal from the judgment of the first Court, and in support of that argument reference was made to *Suresh Chunder Matra v. Kristo Rangini Dasi*⁽¹⁾ and *Parameshwaran Nambudiri v. Vishnu Embrandri*⁽²⁾.

It appears to us that having regard to the decision of the Judicial Committee in *Ledgard v. Bull*⁽³⁾ and in *Meenakshi Naidoo v. Subramaniya Sastri*⁽⁴⁾, we must accept the argument of the appellant and we must hold that the lower appellate Court had no jurisdiction to try the case and that the conduct of

(1) (1893) 21 Cal. 249.

(2) (1904) 27 Mad. 478.

(3) (1886) L. R. 13 I. A. 134.

(4) (1887) L. R. 14 I. A. 160.

the parties could not give it jurisdiction. The Judicial Committee in the second of the above-mentioned cases at page 166 say: "It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Jedgar v. Bull*⁽¹⁾".

Now we hold upon the words of section 32 of the Provincial Small Causes Courts Act that the exclusion of the jurisdiction of all Courts not vested with Small Cause Court powers is indicated in express terms, and the position of the appellate Court in Ahmedabad was that it was a Court where, in the words of the Judicial Committee, no jurisdiction existed.

We, therefore, set aside the decree of the lower appellate Court and restore that of the Second Class Subordinate Judge, but having regard to the conduct of the appellant we make no order as to costs.

Decree reversed.

G. D. R.

(1) (1886) L. R. 13 L. A. 134.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

GANGABAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v.
BASWANT BIN BALLAPPA (ORIGINAL DEFENDANT), RESPONDENT.*

Regulation XVI of 1827—Transfer of Property Act (IV of 1882), section 43—Deshgat Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property—Mortgagee's claim to hold the property against the mortgagor's heir.

A mortgagee of Deshgat Vatan knew that the property which was mortgaged to him was land appurtenant to an hereditary office and inalienable beyond the

* First Appeal No. 75 of 1907.

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SINHJI
(MAHARANA
SHEI)
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HAMIR MON.

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life-time of the incumbent. Subsequently to the mortgage the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. After the enlargement the mortgagee having claimed to hold the property against the heir of the mortgagor,

Held, that the mortgagee took only such estate as the holder of the Vatan property was capable of conveying to the mortgagee at the time of the mortgage and that the mortgagee could not claim to retain the property in virtue of the mortgage after the death of the mortgagor.

FIRST appeal from the decision of M. R. Nadkarni, First Class Subordinate Judge of Belgaum, in Suit No. 38 of 1902.

The plaintiff Hariharav Nagnath, who died while the suit was pending in the Subordinate Judge's Court, sued to recover from the defendants possession of the land in dispute with arrears of rent and mesne profits, alleging that he held the land as mortgagee in possession and had let it out to defendant 1 under a rent-note and that the defendant held over the land after the termination of the tenancy.

Defendant 1 admitted the rent-note and stated that about a month after the execution of the rent-note the plaintiff told him that he had no right to the land and desired the defendant to attorn as tenant to one Mamad Isakh walad Gowaskhan Desai, that he accordingly executed a rent-note to Mamad Isakh and paid him rent every year, that the plaintiff fraudulently retained the rent-note executed in his favour by the defendant and that the defendant was not liable to the plaintiff for possession, rent or profits of the land.

Mamad Isakh being joined as defendant 2 on the contention of defendant 1 answered that the land in dispute was not mortgaged to the plaintiff and was never in his possession, that defendant 1 held a portion of the land as the yearly tenant of defendant 2 and that the plaintiff not having produced his mortgage-deed, nor having given any description of it in the plaint he was unable to say anything with regard to the alleged mortgage.

In his judgment the Subordinate Judge made the following observations:—

The mortgage-deed, exhibit 190, and the exhibits 238, 239 and 240 from the Revenue records show that the plaint land is a part and parcel of the Deshgate Vatan of the second defendant's family. The mortgage, exhibit 190, was effected while sections 19 and 20 of Regulation XVI of 1827 were in force and therefore it was void after the death of the mortgagor, the second defendant's father, who died on the 29th June 1890 (*vide Kulu Narayan v. Hanmapa bin Bhimapa*, I. L. R., 5 Bombay, 435; *Ravlojirav v. Balvantrav*, I. L. R., 5 Bombay, 437; and *Padappa v. Swamirao*, I. L. R., 24 Bombay, 556). The Sanad is not forthcoming and from the endorsement, exhibit 238's original, it seems that on 21st of May 1894 a note was made on the Sanad in accordance with the Government Resolution No. 4277 of the 19th June 1890 to the effect that the said lands shall be continued for ever without increase of the land tax or Nazrana over the said fixed amount and without objection or question on the part of Government as to the rights of any rightful holders thereof whether such rights shall have accrued by inheritance, adoption, assignment or otherwise.

The mortgage, exhibit 190, ceased to be valid on the death of the second defendant's father, the mortgagor, in June 1890 as against the second defendant and the subsequent correction of the Sanad in 1894 by the addition of the note mentioned above cannot operate to render it valid beyond the mortgagor's life-time.

The representatives of the deceased plaintiff appealed.

Inverarity with *C. A. Role* for the appellants (plaintiffs).

Raikes with *N. A. Shiveshwarkar* for the respondents (defendants).

The appeal was argued before Scott, C. J., and Heaton, J., and it was then contended on behalf of the appellants that the Subordinate Judge ought to have raised an issue as to whether the land in suit, though originally a Deshgate Vatan, continued to be so during the life-time of the mortgagor or whether and if so when it became alienable. The following issues were therefore referred for trial to the Subordinate Judge with liberty to the parties to adduce fresh evidence:—

“(1) Whether the mortgage was a subsisting mortgage of the plaint property after the death of the mortgagor?

(2) Whether the property ceased to be a Deshgate Vatan or inalienable beyond the life of the mortgagor in his life-time or if so, when?”

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The findings of the Subordinate Judge on both the above issues were in the affirmative. He held that the lands ceased to be inalienable from 1862 and that the mortgage was a subsisting mortgage after the death of the mortgagor for the following reasons :—

The mortgagor, who was owner in 1862, submitted an application (exhibit 260) to Government testifying his willingness to pay annas 3 in the rupee as Judi in consideration of the commutation of the right of service and in order that the Vatan may be continued permanently and that permission to adopt may for ever be granted.

Government began to levy Judi accordingly but a Sanad was at first issued in which there was the usual provision restricting alienation. He urged that he was entitled to the property free of any restriction. The matter went up to Government and the Legal Remembrancer has in his report (sanctioned and adopted by Government) given a full history of the case and gave his opinion that since 1862 Government treated the property as the private property of the man. Under orders (exhibit 262) from Government the Sanad originally tendered to the Vatan was amended and the clause restricting alienation was dropped. The Sanad as it now reads does not contain any restriction against alienation.

It is urged for defendant No. 2 that the Sanad itself describes the property as Vatan and that it has been so treated in the records of Government (*vide* exhibit 239). As to this it appears that Government does not mean to say that the property has ceased to be Vatan, but by special agreement entered into in 1862 Government has removed the restriction against alienation. Government has the power to make such agreements under section 15 of Bombay Act III of 1874.

Reliance is placed on an order of the Deputy Collector (exhibit 258) ruling that the property could not be alienated beyond the life-time of the then holder. That order was, however, set aside by the Collector (exhibit 249).

Against the findings of the Subordinate Judge the respondents (defendants) preferred cross-objections.

D. A. Khare with *C. A. Rele* for the appellants (plaintiffs) :— The Subordinate Judge has returned his findings in our favour. Therefore the decree should be reversed and our claim for possession should be awarded with arrears of rent.

Robertson with *N. A. Shiveshvarkar* for respondent 2 (defendant 2) :— We have taken objections to the findings of the Subordinate Judge and we contend that those findings cannot

stand. The facts are all admitted and there now remains a question of law.

The mortgage was executed by defendant 2's father in the year 1850. What was then mortgaged was Deshgat Vatan. At the time of the transaction, sections 19 and 20 of Regulation XVI of 1827 were in force. They were repealed by the Hereditary Offices Act III of 1874. Therefore the mortgage which was effected while the provisions of the said regulation were in force, was void against the heir of the mortgagor: *Padapa v. Swamirao*⁽¹⁾, *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa*⁽²⁾. The mortgagor died on the 29th June 1890. Till then the mortgage was perfectly good under those provisions. It was on the death of the mortgagor that we could question the validity of the mortgage and the possession of the mortgagee began to run against us adversely from that time. But before the adverse possession could ripen into ownership, we got into possession and we have a right to tack it on to our title. The mortgagee cannot now question our right to such possession.

The Subordinate Judge held that the land, though originally inalienable, ceased to be so from 1862, and for that reason the mortgage continued to subsist after the death of the mortgagor. For his conclusion the Subordinate Judge has relied upon three things, namely (1) the application of defendant 2's father in the year 1862, exhibit 260, (2) the report of the Legal Remembrancer on that application, and (3) the ultimate resolution passed by Government in the year 1890, a few days before the death of the mortgagor. We contend that the report of the Legal Remembrancer was not admissible in evidence and any finding based thereon is bad. Moreover, the construction which the Subordinate Judge has put on exhibit 260 is wrong. That application shows that our father did not ask that the Vatan should be made his absolute private property and the Government resolution granting the application says that a Sanad should be granted in the terms of the application.

Even assuming that exhibit 260 is capable of the construction put upon it and that the mortgaged property was subsequently

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(1) (1900) 24 Bom. 556.

(2) (1879) 5 Bom. 435.

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enlarged by the said resolution, still the mortgagee would not be entitled to that enlarged estate. In 1850, when the mortgage was effected, the mortgagee was aware that the land was inalienable beyond the life-time of the mortgagor under the provisions of Regulation XVI of 1827. He can get what he then contracted for and not more.

We further contend that our father's application, exhibit 260, and the Government resolution based thereon cannot validate what was in its inception void. The view taken by the Subordinate Judge is erroneous.

D. A. Khare, in reply:—We contend that the property mortgaged was not Vatan. The mortgage-deed does not describe it as such. Even assuming that the property was originally Vatan, we contend that on the application, exhibit 260, made by defendant 2's father, it was converted into private property. Therefore defendant 2 cannot now say that it still continues to be Vatan property. The opinion of the Legal Remembrancer is admissible. In construing a Sanad correspondence may be looked to: *Gulabdas Jaggivandas v. The Collector of Surat* ⁽¹⁾, *Dosibai v. Ishwardas Jaggivandas* ⁽²⁾. The letter of the Legal Remembrancer forms part and parcel of the Government Resolution No. 4277 of the 19th June 1890, and the Sanad was issued in the terms of the resolution.

The findings recorded by the Subordinate Judge are correct. The enlargement is an accession to the mortgaged property and such accession enures to the benefit of the mortgagee. Long before defendant 2 was born, the estate was made transferable. The Sanad was accepted by the Nazir as the guardian of defendant 2 during his minority and this acceptance was not impugned by defendant 2 on his attaining majority.

The orders of the Revenue Courts holding that the property became the private property of the mortgagor and that the mortgage was binding on defendant 2 were not sought to be set aside, exhibit 249.

What is made void under the Regulation of 1827 is the alienation of the allowance attached to the Vatan: *Padapa*

⁽¹⁾ (1878) 3 Bom. 186 at p. 189.

⁽²⁾ (1885) 9 Bom. 561 at p. 567.

v. *Swamirao*⁽¹⁾ and *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa*⁽²⁾ were not cases of settlement. The ruling in *Appaji Bapuji v. Keshav Shamray*⁽³⁾ lays down that a particular settlement may remove a restriction against alienation. In the present case there was a settlement of that description and it had the effect of making the previous alienation (mortgage) valid and binding on the heirs of the mortgagor.

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SCOTT, C. J.:—The contest in this appeal is between the representatives of a mortgagee and the heir of a mortgagor.

The mortgage in question was of a certain *Deshgat Vatan* property effected in the year 1850 between the holder of the Vatan who was the father of the defendants and the person under whom the plaintiffs claim. The property mortgaged is described as *ámchi kshásgat deshgrati paiki jamín* (land out of our private *Deshgat* or property attached to our hereditary office). The mortgage being ostensibly of land attached to an hereditary office was under the rule enunciated in *Kalu Narayan Kulkarni v. Hanmapa bin Bhimapa*⁽²⁾, approved of by the Privy Council in *Padapa v. Swamirao*⁽¹⁾, in its inception void against the heir of the mortgagor by reason of the provisions of Regulation XVI of 1827.

It is contended, however, on behalf of the mortgagee's representatives that by reason of a certain settlement effected between Government and the mortgagor subsequent to the year 1861, the estate of the mortgagor was enlarged into an estate similar to that of any owner of private property and that therefore the mortgagee's representatives are entitled to claim to hold the mortgaged property under the mortgage against the heir of the mortgagor. It is argued that the settlement which is evidenced by an application in the year 1862, a Government Resolution in the year 1890, and a Sanad in the year 1894 issued subsequent to the death of the mortgagor had the effect of converting the property into his absolute estate.

(1) (1900) 24 Bom. 556.

(2) (1879) 5 Bom. 435.

(3) (1890) 15 Bom. 13.

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Without admitting that the interpretation sought to be put upon those documents on behalf of the appellants is correct, but assuming for the purpose of argument that it is so, we think that the altered position cannot affect the representative of the mortgagor. At the date of the mortgage in 1850, the mortgagee knew that the property which was being made over to him in mortgage was land appurtenant to an hereditary office. He knew or ought to have known that by reason of the provisions of the regulation of 1827, that land was inalienable beyond the life of the incumbent. He therefore cannot allege that he has any title by estoppel under which any enlarged estate coming to the mortgagor subsequent to the mortgage would enure to the benefit of the mortgagee, for a title by estoppel rests upon representation made by the grantor and acted upon by the grantee; see *Mussamat Udey Kunwar v. Mussamat Ladu* ⁽¹⁾, and section 43 of the Transfer of Property Act. We hold therefore that the mortgagee took merely such estate as the holder of the Vatan property was capable of conveying to a mortgagee in 1850, and that being so he cannot claim to hold under the mortgage after the death of the mortgagor.

We affirm the decree of the lower Court with this variation that the plaintiffs do bear the costs throughout.

Decree affirmed.

G. B. R.

(1) (1890) 6 Ben. L. R. 283 at p. 291.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

1909.
October 9.

BAI DIVALI (ORIGINAL PLAINTIFF), APPELLANT, v. SHAH VISHNAV
MANORDAS AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), section 33, Order XX, Rules 6 and 7
—Administration suit—Finding on a substantial question of right between
parties—Appointment of receivers—Finding—Decree—Appeal.*

In an administration suit the first Court recorded a finding on a substantial question of right between the parties and appointed receivers. The plaintiff

* Second Appeal No. 481 of 1909.

did not apply to have a formal decree drawn up. The plaintiff however appealed against the finding on the ground that it amounted to a decree. The Judge rejected the appeal holding that there was no decree which could be the subject of an appeal.

On second appeal by the plaintiff,

Held, that the second appeal could not be entertained because there was in fact no formal decree from which an appeal could be preferred.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the order of N. V. Desai, Subordinate Judge of Dhanduka, appointing receivers in an administration suit.

The plaintiff sued to have accounts taken of the estate of her deceased father Madhavji Damodar and then to have the said estate administered under the orders of the Court. The plaintiff alleged that her father made his last will on the 10th May 1899 and died on the 12th September 1902, that under the will the testator disposed of his moveable and immoveable properties in favour of the parties, that is, the plaintiff and defendants 1—5, that the will appointed defendants 1—4 executors, and they had taken possession of the properties, that the executors declined to give anything to the plaintiff or to show her the accounts of the estate and that they did not carry out the several directions contained in the will. Hence the suit.

Defendants 1—4 contended *inter alia* that the plaintiff was entitled only to a one-fourth share of the estate, that defendant 5, the widow of the testator, was wrongly joined, that excepting certain properties which were devoted to charities and also those to which the plaintiff was not entitled under the will, the rest of the moveable and immoveable properties were in the possession of the plaintiff and defendant 5, that defendant 1 never declined to show accounts to the plaintiff, and that the plaintiff should obtain probate.

Defendant 5, the widow of the testator, answered *inter alia* that defendants 1—4 had wrongly taken possession of the bonds and other documents to which she was entitled during her life-time under the will, that the will gave her Rs. 300 per annum for her maintenance which should be charged upon some

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property yielding an income equal to that amount, and the said property be handed over to her, and that under the will Rs. 3,000 in cash were bequeathed to her, but defendants 1—4 deceitfully took Rs. 2,500 from her; therefore they should be ordered to restore that sum.

The Subordinate Judge framed 14 issues in all and out of them on issues 3 and 5 he found as follows:—

“3. The whole of Madhavji’s moveable and immoveable property of any sort whatever has been disposed of by his will.”

“5. It is necessary to appoint a Receiver or Receivers to take charge of the estate and to manage the same till this suit is finally disposed of.”

He therefore nominated the Nazir of his Court and defendant 1, Vishnav Manor, as fit persons to be appointed receivers of the estate. The nomination was made under section 505 of the Civil Procedure Code (Act XIV of 1882) and was submitted to the District Court for the necessary sanction. The District Judge having confirmed the nomination, the Subordinate Judge passed the following order:—

I appoint the Nazir of this Court and Vishnav Manor (defendant 1) to be joint receivers of the estate of deceased Madhavji, Vishnav Manor to give a security of Rs. 5,000 duly to account for what he shall receive in respect of the property and to work without remuneration while the Nazir will work without security and shall be paid a reasonable remuneration to be fixed hereafter.

I authorise these receivers to take possession and manage the whole estate moveable and immoveable of deceased Madhavji except what his widow is entitled to keep with her during her life-time under clause (12) of the will, exhibit 28. I further grant to these receivers all the powers of an owner specified in clause (d) subject to the condition that they shall at no time keep in their possession without this Court’s previous permission any sum exceeding Rs. 200, uninvested, and that they shall invest all the moneys that have to be invested in some safe security with the permission of this Court. They should keep regular accounts of their management and should submit them annually for scrutiny by this Court on 1st July. Each of them shall be responsible for any loss occasioned to this estate by their wilful default or gross negligence.

In case of any disagreement between them on any point they should refer the matter for orders to this Court. The security required from Vishnav to be given by him within a week. That being done this joint appointment will come into operation. If he fails to give the security as required within the

time named the Nazir alone to be a receiver upon the conditions and terms mentioned above.

On appeal by the plaintiff against the appointment of defendant 1 as receiver and against the finding on issue 3, the defendants raised a preliminary objection which the District Judge embodied in the following issue:—

“Does an appeal lie?”

On the said issue the Judge found in the negative for the following reasons:—

Whether under the old Code (section 213 and schedule IV, form 130) or under new (order XX, rule 13) it is necessary in every administration suit to draw up a preliminary decree and against it there is an appeal. Under section 213 the Court was to “order such accounts and inquiries to be taken and made and give such other directions” as it thought fit. Under rule 13 of order XX the Court is bound to pass a preliminary decree “ordering such accounts and inquiries to be taken and made and giving such other directions as it thinks fit.” Now in the present case no decree whatsoever has been drawn up and the judgment itself does not order such accounts and inquiries to be taken and made as are mentioned in schedule IV, form 130 of the old Code. In the old Code as well as in the new the word “formal” in the definition of decree is, I think, important. Mr. Ameer Ali at page 36 of his commentary quotes the opinion of Pigot, J., in 19 Calcutta 452 which shows that this term is not to be ignored, for that learned Judge said: “I must add that had the point been raised I should have felt a difficulty in holding that a paragraph in the judgment, not drawn up in the form of a decree and not embodied in a separate form, is within the terms of the Code of Civil Procedure a decree at all.” In 29 Calcutta, 758—760 the Calcutta High Court advised mofussil Courts to draw up a formal preliminary decree and was apparently of opinion that a paragraph in a judgment was not a decree—that case was expressly followed in X Bom. L. R. 514 on the question which it decided, namely, that it is open to an appellant in an appeal against the final decree, in a partition suit to question the correctness of the preliminary order or decree for partition when no appeal has been preferred against such order within the time allowed by law. The reasoning of Heaton, J., shows that the word “formal” in the definition of decree is important, for he says: “It is alleged that there was a decree dated the 31st July 1906 and consequently there should have been an appeal. Now as a matter of fact there was no decree of that date, though there was a judgment. It is argued that there ought to have been a decree The judgment dated the 31st July determined (by finding on a particular issue) that the plaintiff was entitled to a certain share of two houses. Had the decree followed this judgment it would have been that the plaintiff must get such share in the two houses.”

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Mr. Rao referred to I. L. R. 22 Bom 963 but in that suit there was not only a finding that the estate consisted of certain properties but the amount of the liabilities and outstandings was determined and there was an order that the defendant was to pay a certain amount within two weeks. The High Court also said that the lower Court had drawn up a kind of preliminary decree. In the present case no such decree has been drawn up and had any been drawn up embodying merely the finding on issue 3 it would not have been the preliminary decree which the Code orders to be drawn up in administration suits.

Mr. Mulla at page 7 of his commentary on the new Code refers to order 20, rules 12, 13, 14, 15, 16 and 18 and order 34, rules 2, 3 and rules 4, 5 and 7, 8 as instances of preliminary decrees. The Code itself directs in these rules that certain preliminary decrees shall be framed and I take it, therefore, that in the suits mentioned in these rules no other preliminary decrees are permissible.

There are many conflicting rulings under the old Code as to the meaning of the word "decree." In several of them the term "formal" has been ignored and the word "rights" has been given an extended meaning. Messrs. Woodroffe and Amecalli write at page 38 "There can, we think, be little doubt that what the legislature originally meant by these words (the rights of the parties) to refer to were rights of a substantive as distinguished from rights of a merely processual character."

In the present case no doubt a right of a substantive character has, from one point of view, been determined. But the Code does not give a right of appeal against every finding regarding such a right. It has stated what the preliminary decree is to be and I find no such decree in this case. I hold therefore that no appeal lies against the finding on issue 3.

Having thus disposed of the preliminary point, the District Judge found that the Subordinate Judge had exercised a wise discretion in the appointment of receivers and thus confirmed the order.

The plaintiff preferred a second appeal.

G. S. Rao for the appellant (plaintiff):—The only question is whether the finding recorded by the Subordinate Judge on issue 3 amounts to a preliminary decree and therefore one from which an appeal lies. We instituted the suit for accounts and partition of our share in our deceased father's property which was disposed of by him under his will. The principal point in the case was about the construction of the will. The Subordinate Judge took evidence and recorded his judgment on the point and that judgment practically decided the case. The other questions in the case related merely to details. We appealed to the District

Court and our appeal was rejected on the ground that no appeal lay at that stage. We submit that the adjudication by the Subordinate Judge on issue 3 amounted to a preliminary decree within the meaning of the term "decree" as defined in section 2 of the Civil Procedure Code. It was an adjudication and, so far as the Subordinate Judge was concerned, it conclusively determined the question.

[HEATON, J. :—There is no decree and there is no final adjudication. The lower Court merely recorded a finding but a paragraph in the judgment is not a decree. section 53 of the new Code.]

We submit that that section applies to a final decree and not to a preliminary decree.

[HEATON, J. :—Where does the Code say that no final decree is required to be drawn up in the case of a preliminary decree.]

We submit even if it is necessary, it is a mistake of the Court and such a mistake should not be allowed to operate to our prejudice.

Branson with *T. R. Desai* for the respondents (defendants) was not called upon.

SCOTT, C. J. :—In this case the Subordinate Judge in an administration suit upon issue No. 3 decided in effect a substantial question of right between the parties, and having so decided he appointed receivers of all the property in question in the suit.

An appeal was preferred from his judgment to the District Judge and it was sought to challenge in appeal the finding upon the third issue on the ground that it was a decree. It was, however, objected that there was no decree and the learned District Judge held that there was no decree which could be the subject of an appeal. He therefore disposed of the appeal confining the objections of the appellant to the order for the appointment of receivers.

Against his decision with reference to the appointment of receivers, no second appeal would lie, but the appellant comes here in second appeal contending that there has been a decree with reference to the question raised in the third issue, and that

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the learned District Judge was wrong in declining to hear the appeal with reference to it.

Now a "decree" under the Civil Procedure Code means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and it may be either preliminary or final.

It was apparently the opinion of the learned District Judge that if the decision upon the third issue had been embodied in a formal expression, such as is contemplated by the Code and called a decree, still no appeal would have been maintainable. Without saying that we agree with the Judge in his hypothetical opinion, we think the appeal to this Court cannot be entertained because there is in fact no formal decree. A reference to Order XX will show that a decree is something different from a judgment. The decree has to agree with the judgment and Rule 6 and Rule 7 prescribe what the decree shall contain. Section 33 also leads to the same conclusion, for it provides that the Court after the case has been heard shall pronounce judgment and on such judgment a decree shall follow; that judgment may be either preliminary or final.

The appellant has only herself to thank for this result. If, as the unsuccessful party, she had directed her agent to apply that a decree should be drawn up against which an appeal could have been preferred the result might have been different. But we cannot allow the provisions of the Civil Procedure Code to be disregarded by appellants who seek to take advantage of the rule which allows of appeals from decrees. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

G. P. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar.

NATHUBHAI KASANDAS (ORIGINAL PLAINTIFF), APPELLANT, v.
PRANJIVAN LALCHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1909.
November 22.

Limitation Act (XV of 1877), Article 179—Decree—Execution—Execution made conditional upon payment of Court fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law.

A decree was passed on the 30th June 1900 whereby partition of immoveable property was ordered: but the execution of the decree was made conditional on the payment of the proper Court fees. On the 29th June 1903 an application to execute the decree was made, but it was dismissed as it was not accompanied by payment. A second application to execute the decree was presented on the 27th June 1906: it was accompanied by payment. The lower Courts dismissed it on the ground that it was time-barred inasmuch as the first application made in 1903 was not one in accordance with law as required by Article 179 of Schedule II to the Limitation Act, 1877.

Held, that the first application was made in accordance with law, for, upon that application, it was competent for the Court to order that the execution should begin on the Court fees being paid within a certain date.

Held, further, that the second application was within time.

PER CURIAM:—An application for execution of a decree to be in accordance with law must ask for something *within* the decree and not *outside* it.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Broach, confirming the decree passed by M. H. Vakil, Subordinate Judge of Ankleshwar.

Proceedings in execution of a decree.

The decree was passed on the 30th June 1900. It ordered a partition of immoveable property in possession of the defendant and directed that before the plaintiff could recover his share by partition he should pay the amount of Court fee leviable on his claim.

The plaintiff applied on the 29th June 1903 to execute the decree but the Court dismissed the application as it was not accompanied by payment of Court fees.

* Second Appeal No. 367 of 1903.

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A second application, accompanied by the payment, was made on the 27th June 1906.

The lower Courts dismissed the application on the ground that it was barred, inasmuch as the first application not having been accompanied by payment was not made in accordance with law as required by Article 179 of the Limitation Act, 1877.

The plaintiff appealed to the High Court.

M. N. Mehta for the appellant.

L. A. Shah for the respondent.

CHANDAVARKAR, J.:—The decree, execution of which has been held by both the lower Courts to be barred by the Law of Limitation, was one for partition of immoveable property passed on the 30th of June 1900, and directed that the plaintiff should not be entitled to execute it until he had paid Court fees. The present application for execution was made on the 27th of June 1906 by the plaintiff, who with it paid the Court fees into Court in fulfilment of the condition precedent to his right to execution. *Prima facie* the application is barred, having been made more than three years after the date of the decree. But the application is sought to be brought within time by reason of an application made for execution on the 29th of June 1903. The lower Courts have held that that application does not help the plaintiff, because it was not one made in accordance with law, as required by Article 179 of Schedule II to the Limitation Act. In the present case what the decree directed was that the plaintiff should not be entitled to execution—that is, to the partitioning off of his share and its allotment to him—unless he paid the Court fee on that share. The payment was prescribed as a condition of the partition, not to the making of an application for it. There was nothing in the decree to prevent the plaintiff from applying for execution on one day and paying the Court fee on any day subsequent before the disposal of the application by the Court. The application itself cannot be said to have been not in accordance with law merely because it was not accompanied by a payment of the Court fee. This view is in accordance with the principle of the decision of this Court in *Narayan Govind v.*

Anandram Kojiram⁽¹⁾, which is followed by the Madras High Court in *Syed Hussain Saib Rowthen v. Rajagopala Mudaliar*⁽²⁾.

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But it is urged for the respondents that the application of the 29th of June 1903 was not in accordance with law, because it asked the Court to do what it was not competent to do—that is, it asked the Court to order partition to be effected without payment of the Court fee directed by the decree as a condition of such order. And in support of this argument *Chattar v. Newal Singh*⁽³⁾, *Munawar Husain v. Jani Bijai Shankar*⁽⁴⁾, *Langtu Pande v. Baijnath Saran Pande*⁽⁵⁾ are cited. It is true that, according to these decisions, as also according to *Pandarínath Bapuji v. Lilachand Hatibhai*⁽⁶⁾, an application for execution, which asks the Court to do what it has no power under the decree to do, is no application for execution at all. The reason is that an application for execution of a decree to be in accordance with law must ask for something *within* the decree and not *outside* it. Applying that test here, what the plaintiff asked the Court to do by his application of the 29th of June 1903 was not outside the decree. It was within the competence of the Court to order partition on Court fee being paid as directed by the decree. The decree directed that no partition should be effected in execution unless Court fee were paid. Upon the plaintiff's application it was competent for the Court to order that the execution should begin on Court fee being paid within a certain date. No doubt the Court passed no such order but dismissed the application for execution on the ground that Court fee had not been paid; but all the same it was competent to the Court to pass an order for payment prescribing a date for it. On these grounds the *darkhast* must be held to be within time. The decree is reversed and the *darkhast* remanded for disposal according to law. Costs of the *darkhast* hitherto incurred including those of this second appeal to be paid by the respondents.

Mr. Shah argues that the point on which I have held that the present *darkhast* is not barred by limitation is *res judicata*

(1) (1891) 16 Bom. 480.

(2) (1906) 30 Mad. 28.

(3) (1889) 12 All. 64.

(4) (1905) 27 All. 619.

(5) (1906) 28 All. 387.

(6) (1898) 13 Bom. 237.

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inasmuch as this very point was substantially decided by this Court against the present appellant in Second Appeal No. 119 of 1904. That second appeal arose out of an application for execution of this very decree, which both the Courts below had dismissed because the appellant had not paid the Court fee. The second appeal was decided by Crowe, J., and myself and we confirmed the order of the lower Courts dismissing the application. There is no written judgment. Mr. Markand Mehta for the appellant reminds me that the ground on which Crowe, J., and I confirmed the order was that the plaintiff had no right to execution without payment of Court fee. And it was so, if I re-collect rightly. That was no adjudication either that the application then made or any previous application was not in accordance with law for the purposes of limitation or that the condition in the decree as to Court fees was of such a character that the Court fee must be paid *first* and the application for execution could only be made *afterwards*.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

P. R. & Co, APPELLANTS AND PLAINTIFFS, v. BHAGWANDAS
CHATURBHUI, RESPONDENT AND DEFENDANT.*

1909.

March 10.

Suit for price of goods bartered and sold—Cause of action—Indian Contract Act (IX of 1872), sections 39, 73, 120—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), section 128.

Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count, thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case

* Appeal No. 65. Suit No. 619 of 1908.

both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.

In section 128 of the Civil Procedure Code of 1903 there is legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.

The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands. The fact that a party to a contract may under section 39 of the Indian Contract Act, when the other side has refused to perform it, put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract.

Per BACHELOR, J.—Section 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy.

APPEAL from the judgment of Knight, J.:—

On the 3rd September 1907 the defendants agreed to purchase from the plaintiffs 440 cases of Turkey red goods on the terms of a written contract. There arose a dispute between the plaintiffs and the defendants as to whether the goods which the plaintiffs tendered under the contracts were equal to sample and after certain correspondence between the parties the defendants agreed to take delivery of the goods on getting certain allowances at various rates in respect of different goods. The defendants having failed to take delivery or to pay for the goods the plaintiffs claimed to recover from the defendants the price of the goods save as to 22 cases which did not arrive within contract time after deducting the allowances aforesaid.

At the hearing seventeen issues were raised of which sixteen were on questions of fact and were found in the plaintiff's favour. The other issue, *viz.*, whether the plaintiffs could sue for the price of the goods was found in the defendant's favour and the suit was dismissed with costs, Knight, J., holding that though the

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property in the goods had passed to the defendant and he was bound to pay for the goods a suit for damages for breach of contract in not accepting the goods was the only remedy open to the plaintiffs and the plaintiffs not having proved damages based upon the difference between the contract rate and the rate at the date of the defendant's failure to take the goods they could not recover. Against this decision the plaintiffs appealed.

Strangman, Advocate General, and *Inverarity* for the appellants:—We submit that the view taken by the Court below is not correct. In the first instance the Contract Act is not exhaustive. Its preamble says that it defines and amends certain parts of the law relating to contract, it does not consolidate the law. The Privy Council judgment in *Irrawaddy Flotilla Company v. Bugwandass*⁽¹⁾ lays down that the Act is not exhaustive. The rulings of the Privy Council cited by the learned Judge do not seem to support the inferences drawn from them. We therefore submit that although the Contract Act does not anywhere specifically provide for a suit being filed by the vendor for the price, it does not by implication or otherwise exclude that remedy. The Act was passed in 1872 but in the Civil Procedure Code of 1882 forms of plaints are given (Forms 10 and 12) for a suit by a vendor for the price of goods sold but not accepted or taken delivery of by the purchaser. The same forms are reproduced in the new Civil Procedure Code of 1908 (Forms 3 and 6).

Buchanan v. Abdull⁽²⁾ and *Prag Narain v. Mul Chand*⁽³⁾ support the view that a suit for the price can be maintained in India, both these cases had been discounted by the learned Judge, the first on the ground that it was before the passing of the Specific Relief Act 1877, section 21 of which prohibits a suit for specific performance of a contract wherein monetary compensation would be an adequate relief; and the second on the ground that it hardly applies to the case. As regards the first case the learned Judge's argument may be met by the answer that although in 1876 the Specific Relief Act was not passed yet the principle laid down in section 21 of that Act was not a new rule of

(1) (1891) L. R. 18 I. A. 121.

(2) (1875) 15 Ben. L. R. 276 at p. 292.

(3) (1897) 19 All. 535.

law enacted in 1877 but it was only the codification of the English principle or rule of equity then in existence and applicable to Courts in British India and secondly the learned Judge does not say that section 21 of the Specific Relief Act bars this suit, but says that the Contract Act does not allow it. The decision in *Buchanan v. Ardall*⁽¹⁾ is after the passing of the Contract Act and entitled to weight. As regards section 120 of the Contract Act we submit the learned Judge has misunderstood it. We submit that section 120 relates to the cases of what is known in the English Law as "anticipatory breach". The words in the section are "refuses to accept" not "refuses to take delivery". If a buyer says that he will not accept the goods sold then the vendor is immediately entitled to treat this as a breach of the contract, he need not wait till the time of performance, *i.e.*, the taking of the delivery arrives, he may treat the refusal as a breach and may rescind the contract and sue for damages at once, that is, he may exercise the power given to him by section 39 of the Act; see illustration (c) to section 73. But we submit the vendor is not bound to do so. He may not choose to rescind the contract (the words in section 39 are "may" put an end to the contract) and enforce whatever remedies he has. If for some reason the remedy of resale cannot be validly made we submit that the vendor is not compelled by the Contract Act to rescind the contract; for if the learned Judge's view is correct it comes to this that a vendor must either resell or if he cannot do it he must rescind the contract. We submit the Act does not compel him to do so. Nor is section 120 intended to have that effect. If he is not bound to rescind and if he has not resold or cannot validly resell, it is his remedy to sue for the price. If the Contract Act had not been passed and the English Common Law had applied he would certainly have sued for the price. Is his right taken away by the Contract Act? As stated above the Act not being a consolidation of the law of contract but meant only to define some parts thereof we submit the right is not taken away.

Setalvad and *Desai* for the respondent:—In India having regard to the provisions of the Indian Contract Act if a pur-

(1) (1875) 15 Ben. L. R. 276.

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chaser wrongfully refuses to take delivery of the goods the vendor of the goods cannot sue the purchaser for the price of the goods sold but not delivered whether the property or the goods has passed to the purchaser or not. The vendor's only remedy is to sue for damages for breach of contract. If the vendor has exercised the power reserved to him by section 107 of the Contract Act and resold the goods on account of the purchaser the measure of damages would be the difference between the contract price and the prices realised at the resale, but if the vendor has not exercised or could not exercise the power of resale the damages would be the difference between the contract price and the market price of the goods at the date of the breach. The vendor has no other remedy. We rely on sections 120 and 73 of the Indian Contract Act. The Common Law of England allowed a vendor to sue for the price of goods bargained and sold but not delivered when the property in the goods had passed to the purchaser and the same rule of law was codified by section 49 of the Sale of Goods Act, 1893. When the Contract Act was passed in 1872, this rule of the English law was not embodied in it. The Contract Act is exhaustive and therefore the legislature must be deemed to have excluded this remedy in India.

See *Gokul Mandar v. Padmanund Singh*⁽¹⁾, *Mohori Bibee v. Dharmodas Ghose*⁽²⁾.

Strangman in reply.

SCOTT, C. J.:—On the 3rd of September 1907 the defendant agreed to purchase from the plaintiffs 440 cases of Turkey Red goods on the terms of a written contract. Disputes arose as to whether the goods tendered by the plaintiffs were equal to sample and eventually the defendant agreed to take the goods subject to certain allowances. The defendant afterwards failed to take delivery or to pay for the goods and the plaintiffs brought this suit to recover the amount payable under the contract less the said allowances amounting with interest to the date of suit to Rs. 1,11,573-4-9.

(1) (1902) L. R. 29 J. A. 196 at p. 202.

(2) (1903) 30 Cal. 539 at p. 548.

The learned Judge of the lower Court found that the property in the goods had passed to the defendant and that he was bound to take delivery and pay for the goods but being of opinion that a suit for damages for breach of contract in not accepting the goods was the only remedy open to the plaintiffs and the plaintiffs not having proved damages based upon the difference between the contract rate and the market rate at the date of the defendant's failure to take the goods he dismissed the suit with costs.

The reasoning by which the learned Judge arrived at the conclusion that a suit for the price of goods sold is not maintainable is briefly as follows :—

The English Sale of Goods Act, 1893, explicitly provides that where the property has passed to the buyer and he neglects to pay the seller may maintain an action for the price. The Indian Contract Act does not contain any such provision. The Indian Contract Act is exhaustive of the law of India relating to the sale of goods; therefore such an action is since the passing of the Indian Contract Act no longer maintainable in India.

I think it can be demonstrated that this inference as to the intention of the Indian legislature is erroneous.

Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count (Bullen & Leake's Precedents of Pleadings, 2nd Edn., p. 29), thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages.

Counsel for the respondent in supporting the judgment of the lower Court was driven to contend that since the passing of the Indian Contract Act the only money claim possible under a contract is a claim for damages for breach and that no claim for

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debt can arise out of contract. He contended for example that a suit for the price of goods sold and delivered which he admitted to be maintainable was really a claim for compensation for breach of contract. That this was not the view of the legislature is apparent from the schedule of forms prescribed by section 641 of the Code of Civil Procedure of 1882 in which Part A relates to claims for debts and liquidated demands mostly arising out of contract and part B to claims for compensation for breach of contract. Forms 10 and 12 are forms of plaints for the price of goods sold of which delivery has not been taken.

In section 128 (f) (i) of the Civil Procedure Code, 1908, which was passed some months before this suit was heard though it did not become law until the 1st of January last, it is provided rules may be made for summary procedure in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest arising on a contract express or implied.

Here we have a reproduction with certain immaterial changes due to altered circumstances of the words of section 25 of the Common Law Procedure Act, 1852, which, as can be demonstrated from the forms of pleading in schedule B, Nos. 1 and 36, included suits for the price of goods bargained and sold.

I take it therefore that in section 128 of the Code of 1908 we have legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.

The conclusion is that the Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands.

The fact that a party to a contract may under section 39 when the other side has refused to perform it put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril; he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract.

BATCHELOR, J.:—By a contract made between the parties the plaintiffs agreed to sell and the defendants agreed to buy 440

cases of Turkey Red goods valued at over a lăkh of rupees. The defendants on various grounds declined to take the delivery of the goods, and the plaintiffs brought this suit to recover the price with interest at six per cent.

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Several questions of fact were raised by the defendant at the trial and were all decided by Knight, J., in the plaintiff's favour; with these questions, however, we have no further concern, as the lower Court's findings are accepted by counsel for the respondent. It will be enough to observe that the state of facts on which this appeal is to be decided is that the defendants had no excuse or justification for refusing delivery of the goods offered, and that the property in these goods had passed to the defendant. Despite these findings the learned Judge conceived himself obliged to dismiss the suit on the ground that a suit for the recovery of the price was not maintainable; the plaintiff's sole remedy being a claim for compensation in damages estimated at the difference between the agreed price and the price at which the plaintiffs could have sold the goods to another person. The question to be determined is whether this view is correct, or whether the plaintiffs are entitled to sue for and recover the full agreed price.

Briefly stated the learned Judge's opinion is based upon the view, urged now by Counsel for the respondents, that the Indian Contract Act is exhaustive, and that by virtue of sections 120 and 73 of the Act the plaintiffs' sole remedy was a suit for compensation for any loss or damage caused to them by the defendants' breach of the contract. It is the admitted fact that the Indian Contract Act does not specifically authorise a suit to recover the price of goods sold even where the property in the goods has passed to the buyer. Moreover, as the learned Judge below has pointed out, it has been laid down by their Lordships of the Privy Council that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and that it is not the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction. See *Gokul Mandar v Pudmanund Singh* ⁽¹⁾ and the judg-

(1) (1902) L. R. 29 I. A. 196 at p. 202.

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ment of Lord Herschell in *Bank of England v. Vagliano Brothers*⁽¹⁾.

The case is carried a step further in *Mohori Bibee v. Dharmadas Ghose*⁽²⁾ where the Judicial Committee in dealing with this particular Act pronounce that so far as it goes it is exhaustive and imperative.

That, as I understand it, is a fair statement of the case for the respondents. The answer to it appears to me to be that this is not a suit for compensation upon the breach of the contract, but is a suit in debt for money owing. *Ex concessis* the property in the goods had passed to the buyers, and that being so, the agreed price became, I think, a sum of money due and owing to the sellers. True, the buyers were guilty of a breach of the contract as defined in section 120 of the Act, but that circumstance did not impose on the sellers an obligation to accept the breach and sue in damages. It was, I conceive, still open to them to affirm the contract and claim the price which had become due under it. That remedy, it is admitted, would have been available to them in Bombay under the English common law before the introduction of the Indian Contract Act of 1872, as it would be available to them now in England under section 49 (1) of the Sale of Goods Act, 1893. It is urged that since no such remedy is provided in the Indian Contract Act, it must be taken to have been excluded on those principles of the construction of a Code to which I have made reference. But the argument is beside the point, if my view of the true character of this suit is right, for in that case the relief claimed is outside the ambit of section 73. That section prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy. Though the debt is, no doubt, owing upon a contract, it is owing upon a still affirmed contract,

(1) [1891] A. C. 107 at pp. 144-45.

(2) (1903) 30 Cal. 539 at p. 543.

and the suit is in debt and not in damages. Of the principles applicable to such a suit there is no reason to suppose that the Contract Act is the repository, still less that it is the sole repository, for the Act does not purport to do more than "define and amend certain parts of the law relating to contracts." Further room for this opinion is made by the decision of the Privy Council in *Irrawaddy Flotilla Company v. Bugwandass*⁽¹⁾ where their Lordships say that "the Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. . . There is nothing to show that the Legislature intended to deal exhaustively with any particular Chapter or sub-division of the law relating to contracts."

As to illustration (h) to section 73, I do not think that it advances the case either way, for, first, we are not told that the property in the iron sold had passed to the buyer, B, and, secondly, A's suit was expressly a suit brought under section 73, and the illustration merely describes the method in which the compensation should be reckoned.

Then I was much impressed by the Advocate General's argument that even in the case of goods sold and delivered the Act makes no provision for a suit to recover the price, though admittedly such a suit would be perfectly good. Counsel for the respondents endeavoured to meet this point by the contention that there the agreed price would be identical with the compensation defined in the section. That may be so, but I am not the less of opinion that the ground of the recoverability would be that the money was a debt due upon a contract still subsisting *quoad* the plaintiff; that seems to me both a simpler and a truer account of the case than to regard the price as the "compensation for loss or damage caused which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it." To my mind the mere recital of these words of the section suggests that it was never intended, and is not appropriate to govern such a suit, but has reference only to the question of computing the amount of damages allowable in a suit where a party damnified

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(1) (1891) L. R. 18 I. A. 121 at p. 129; 18 Cal. 620 at p. 628.

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by a breach of contract seeks only to be indemnified. That, I think, is not the case here the plaintiffs do not ask the Court to assess in money the damage suffered by them in consequence of the defendant's breach of the contract that has already been done by the parties themselves, and the plaintiffs only seek to obtain that particular sum of money which by the terms of the contract is now money belonging to them in the hands of the defendants.

Forms 10 and 12 of Schedule IV of the Code of Civil Procedure of 1882, which was in force when the suit was instituted, afford further support to the view that the Legislature never intended or attempted to invalidate a suit for the price of goods bargained and sold.

The plaintiffs' suit is admittedly good unless it is prohibited by virtue of section 73 of the Contract Act. For the foregoing reasons I am of opinion that it is not so prohibited, and I therefore agree that the appeal should be allowed with costs.

Appeal allowed.

Attorneys for appellants *Messrs. Payne and Co.*

Attorneys for respondents *Messrs. Daphtary, Ferreira and Divan.*

B. N. L.

APPELLATE CIVIL.

1909.
 October 1.

Before Sir Basil Scott, Kt, Chief Justice, and Mr Justice Batchelor.

PARASHARAMPANT SADASHIVPANT (ORIGINAL PLAINTIFF), APPELLANT,
 v RAMA b/n YELLAPPA AND ANOTHER (ORIGINAL DEFENDANTS), RES-
 PONDENTS *

Registration Act (III of 1877), sections 17 and 49—Release—Document compulsorily registrable—Registration by mistake in a wrong book—Mistake not to affect parties—Document duly registered—Endorsement releasing mortgaged property for consideration in cash—Registration.

A release whereby a father transferred all his rights of ownership in his immovable and moveable property in favour of his son was registered not in

* Second Appeal No. 3 of 1909.

Book No. 1, but in Book No. 4, that is to say, not in the Book kept for the registration of documents compulsorily registrable under section 17 of the Registration Act (III of 1877).

Held, that the release must be considered as having been duly registered. The father's property was capable of identification and the error of the registrar in registering the document in Book No. 4 should not be allowed to affect the parties prejudicially.

Sorabji Edaji v Ishwardas Jagjandas (1) followed.

An endorsement made by a mortgagee (on the back of the mortgage-deed) releasing the mortgaged property in consideration of a cash payment of Rs. 300 is a document which requires registration, and not being registered was not admissible in evidence either of the redemption of the property or of the real nature of the original transaction between the parties.

SECOND appeal from the decision of A. D. Brown, Assistant Judge of Dhárwár, reversing the decree of T. V. Kalsulkar, Subordinate Judge of Hubli.

The plaintiff sued to recover possession of the land in dispute together with mesne profits alleging that the defendant's father sold the land to plaintiff's grandfather Antajipant on the 24th March 1879 and that the defendants took wrongful possession seven or eight years before suit. The suit was filed in May 1904.

The defendants replied *inter alia* that the plaintiff had no right to institute the suit so long as plaintiff's father was alive, that the defendants' father mortgaged the land in suit to plaintiff's grandfather on the 24th March 1879 for Rs. 300, that the transaction was really a mortgage though in form a sale, that it was orally agreed that Antajipant should enjoy the land for interest on Rs. 300, that Antajipant was in possession and enjoyment through tenants including the defendants, that the defendants redeemed the land on the 2nd October 1894 on payment of Rs. 300 to plaintiff's uncle Dattopant who endorsed the receipt of the amount on the back of the deed that since then the defendants had been in possession as owners.

The Subordinate Judge found that the sale-deed passed by the defendants' father to the plaintiff's grandfather was not in reality a mortgage, that there was no redemption as alleged by

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(1) (1892) P. J., p. 5.

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the defendants, that the suit was maintainable and that the plaintiff was entitled to recover mesne profits from date of suit to date of possession. He, therefore, passed a decree awarding the claim for possession with mesne profits.

With respect to the defendants' contention that the plaintiff was not entitled to maintain the suit because his father was alive the Subordinate Judge found that the plaintiff's father had, on the 2nd June 1903, passed a release to the plaintiff relinquishing his rights to the property in plaintiff's favour. The Subordinate Judge made the following observations with reference to the release :—

The defendants' pleader contended that the release is void as no description of the property is given as stated in section 21 of the Indian Registration Act. I do not think so, as no particular land is mentioned but all lands which can be identified when necessary by other evidence. Defendants' pleader also contended that as the release was registered in book No. 4 and not in book No. 1, it should not affect immoveable property. I think that the error of the Sub-Registrar should not be prejudicial to the public and that the release should be considered to be duly registered (*vide Sorabji Edalji v. Ishwardas Jagjivandas*, P. J., 1892, p. 5). Plaintiff and his father were owners. As plaintiff's father gave his interest to plaintiff, plaintiff became full owner and hence he is entitled to maintain the suit.

On appeal by the defendants the Assistant Judge reversed the decree and dismissed the suit holding that it was bad for non-joinder of plaintiff's father, that the defendant was entitled to have the sale (exhibit 49) treated as a mortgage and nothing was due to the plaintiff on account of redemption. The following were some of his reasons :—

Plaintiff claims that under exhibit 38, dated 2nd June 1903 he is the exclusive owner of the property in suit and that his father lost all interest in the property on the execution of that release.

But exhibit 38 contains no description whatever of the lands which it purports to transfer and therefore under section 21 of the Registration Act it could not be registered as a document affecting immoveable property.

The case differs from *Sorabji v. Ishwardas*, P. J. 1892, p. 5, quoted by the Sub-Judge. In that case the land was described and the entry of the document in Book IV instead of Book I, was entirely the mistake of the Sub-Registrar. It was held that the mistake did not invalidate the registration. But in that case the document should have been entered in Book I. In the present case the document ought not to have been accepted for registration at all. In *Baij*

Nath v. Sheo Sahoy it was held by the Calcutta Full Bench (18 Cal. 556) that a false or insufficient description rendered the registration void. In *Narasamma v. Subbarayudu* (18 Madras 365) the document appears to have been very similar to that in the present case. The executant of the release subsequently sold the land covered by the deed of release. It was held that the registration was not valid against the purchaser. If that is the law, a purchaser from plaintiff's father would be able to contend successfully that his title was not affected by exhibit 38. Plaintiff might be able to enforce the agreement against his father, but the record shows that the present plaintiff's father disputes the agreement (exhibit 62) and is in actual possession of a large part of the family land, as admitted by plaintiff (exhibit 77). Under these circumstances I find that plaintiff's father is not proved to have parted with his interest in the land in suit and should have been made a party to this suit.

* * * * *

All these reasons seem to justify the conclusion that the transaction was one of mortgage. The endorsement on exhibit 49 not being registered the release cannot be strictly proved. But in view of the Dekkhan Agriculturists' Relief Act the point is not important. For, if an account be taken, defendants can prove the payment of the principal and as nothing then remains due they are entitled to possession.

The plaintiff preferred a second appeal.

D. A. Khare for the appellant.

N. A. Shiveshvarkar for the respondents (defendants).

SCOTT, C. J.:—The plaintiff sued the defendants for possession of certain land alleging that the defendants' father had sold it to the plaintiff's grandfather in 1879.

The defendants resisted the claim contending that the alleged sale was a mortgage which had been redeemed in 1894 by payment of Rs. 300 to the plaintiff's uncle Dattopant and that the defendants had since then been in possession as owners.

It was found by both the Courts that the defendants had been in possession as tenants of Dattopant, the plaintiff's uncle, prior to 1894, the date of the alleged redemption.

The defendants set up a case of possession since 1893. The suit was filed in May 1904; so that upon the defendants' case no question of limitation arises.

The Subordinate Judge found that the defendants' story of redemption by payment of Rs. 300 in 1894 was false and that

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the endorsement appearing upon the sale-deed was not a genuine endorsement, and passed a decree in favour of the plaintiff for possession.

An appeal was preferred to the Assistant Judge who held first, that the plaintiff was not entitled to maintain the suit on the ground that he did not prove that he was the exclusive owner of the property claimed, since it was not shown that his father, who was still alive, had lost his interest therein; secondly, he held that the deed of 1879, though on its face a sale-deed, was really a mortgage, and he came to that conclusion in consequence of the weight he attached to the endorsement upon the sale-deed purporting to be made by Dattopant admitting the receipt of Rs. 300 in 1894 and releasing the property. He therefore came to a different conclusion on the question of fact to that arrived at by the Subordinate Judge and in second appeal we are, so far as his finding upon the facts is material, bound to accept his decision. We will take the two points decided in favour of the defendants in order.

The plaintiff claims to be entitled to maintain this suit alone without the co-operation of his father by reason of a release executed by his father in his favour on the 2nd June 1903 whereby he became the owner of the whole of the property in suit. By that document his father purported to transfer to him all his rights of ownership which he had in his immoveable and moveable property. The document was presented for registration and was accepted by the Registrar but it was registered not in Book No. 1 but in Book No. 4, that is to say, not in the Book kept for the registration of documents compulsorily registrable under section 17 of the Registration Act. It is on the ground of the want of registration that the defendants contend that the plaintiff cannot be held to be the sole owner of the property in question assuming that his case is in other respects a true one. The learned Subordinate Judge held that the error of the Sub-Registrar ought not to prejudice members of the public and that the release should be considered to be duly registered upon the authority of *Sorabji Edalji v. Ishwardas Jagjivandas*⁽¹⁾. His

(1) (1892) P. J. 5.

decision upon the point was reversed by the Assistant Judge relying upon the case of *Baij Nath Tewari v. Sheo Sahoy Bhagut*⁽¹⁾ and *Narasamma v. Subbarayudu*⁽²⁾.

In our opinion the view taken by the Subordinate Judge should prevail. The property of the plaintiff's father is capable of identification, and the case in so far as it involves a discussion of the applicability of sections 21 and 22 of the Registration Act is on all fours with that of *Narasimha Naganevaru v. Ramalingama Rao*⁽³⁾, in which it was held that the words "my family property" were sufficiently precise to entitle the document to registration. The error of the Sub-Registrar in registering the document in Book No. 4 instead of Book No. 1 should not be allowed to prejudice the plaintiff. In this connection the remarks of their Lordships of the Privy Council in *Sah Mukhun Lall Panday v. Sah Koondu Lall*⁽⁴⁾ are appropriate. Their Lordships say:—

"Now, considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of sections 19, 21 or 36, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in section 83 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertance of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under section 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover, until it is too late to rectify it, the error by which, if the registration is

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(1) (1891) 18 Cal. 556.

(3) (1899) 10 Mad. L. J. R. 104.

(2) (1895) 18 Mad. 364.

(4) (1875) L. R. 2 I. A. 210 at p. 216.

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in consequence of it to be treated as a nullity, they may be deprived of their just rights."

We, therefore, hold as was held in the case of *Sorabji Edalji v. Ishwardas Jagjivandas*⁽¹⁾, above referred to, that the document must be considered as having been duly registered. It follows, therefore, that the plaintiff is entitled to maintain this suit alone.

The next point to be considered is whether the Assistant Judge was justified in admitting as evidence the endorsement purporting to be made by Dattopant releasing the property in consideration of a payment of Rs 300 in 1891. It is clear that a release in consideration of a payment of Rs. 300 is a document which requires registration and this endorsement has not been registered. The learned Assistant Judge seems to have been aware of the difficulty, for, he says "the endorsement on Exhibit 49 not being registered the release cannot be strictly proved. But in view of the Dekkhan Agriculturists' Relief Act the point is not important. For, if an account be taken, defendants can prove the payment of the principal and as nothing then remains due they are entitled to possession." These remarks appear to be irrelevant because it was not proved in the case that the defendants were agriculturists to whom the Dekkhan Agriculturists' Relief Act applied.

We, therefore, hold that having regard to the provisions of section 49 of the Registration Act, the endorsement was not admissible in evidence of either the redemption of the property or the real nature of the original transaction between the parties. That being so, we reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with costs throughout.

Decree reversed.

G. B. R.

⁽¹⁾ (1892) P. J. 5.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Batchelor

JETHABHAI KEVALBHAI (ORIGINAL DEFENDANT), APPELLANT, v. CHOTALAL CHUNILAL AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1909.

October 6.

Will—Executor—Testator's direction to carry on his trade—Loss suffered in the course of the business—Mortgage—Liability of the executor—Testator's assets liable

One Gordhandas made a will and died leaving him surviving his widow, a daughter and her husband and two grandsons by the daughter. Under the will the testator appointed his widow and the daughter's husband executor and executor and directed among other things that in order to perpetuate his name his business should be carried on by the executor so long as it could be carried on at a good profit but, should it appear that the trade will suffer so as to destroy his reputation, the executor should stop it. At the time of his death the testator possessed *inter alia* a cotton ginning factory. The executor and executor carried on the business in the testator's name for some time and having found that large liabilities were incurred in the course of the business the factory was mortgaged to J. with possession. The mortgage was executed by the testator's widow as owner of the firm of Gordhandas and by her daughter. The fact of the will was denied in the mortgage conveyance. The ladies executed the mortgage by affixing their marks and their names were written by the executor. J. sued the mortgagor ladies and the executor to recover the mortgage-debt and obtained a decree. The executor died while the suit was pending. The mortgage property was sold under J's decree and was purchased by him at the court-sale. In the meanwhile the beneficiaries under the will, that is, the two grandsons of the testator and the sons of the deceased executor, brought a suit against J. for a declaration that the property was not liable to be sold under the defendant's mortgage-decree and that the defendant had obtained by his purchase no right as against the plaintiffs' rights in the property.

Held, dismissing the suit, that the mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner, the executor, who had the implied authority of the testator to deal with the factory in the ordinary course of business. The mortgage was therefore valid and binding on the executor as principal.

Juggewundas Keeka Shah v. Ramdas Brybookun-Das⁽¹⁾ followed.

A mortgage by a trader under a testamentary trust of the testator's property is referable to his implied authority as a trustee and not to his position as executor.

* Second Appeal No 703 of 1908.

(1) (1841) 2 Moo. I. A. 487.

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CHOTALAL.*Devitt v. Kearney*⁽¹⁾ followed.

An executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee.

The trustee, though personally liable for the debts which he contracts in the course of his business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned.

SECOND appeal from the decision of W. Baker, District Judge of Surat, reversing the decree of J. E. Modi, First Class Subordinate Judge.

Suit for a declaration.

One Gordhandas Ambaidas died on the 3rd June 1896 after having made a will dated the 27th May 1896. He left him surviving his widow, Fulkore, a daughter, Rukhmini, and her husband, Chunilal, and two grandsons by Rukhmini and Chunilal, namely, Chotalal and Maganlal. In his will Gordhandas appointed Fulkore and Chunilal managers of his estate and gave his property to Fulkore for her life and after her to the two grandsons. Paragraph 7 of the will ran thus :—

7th. At present I am carrying on my trade (and) business in cotton—in seed, cotton, gin(ning-business), dealings and transactions, &c.—in my (own) name; and after my death, the same shall, in order to perpetuate my name, be continued (to be carried on) in my name by my son-in-law Chunilal Tribhuwandas, and such trade shall be continued (to be carried on) so long as it could be carried on at good profit. Should it appear that the trade would suffer in such a way as to destroy my name (reputation) the said Chunilal Tribhuwan shall cease to carry on trade in my name because it is my wish that it should not so happen after my death as to injure my name in any way. The said Chunilal Tribhuwan is even at present carrying on the vahivat in respect of my trade and business. He is acquainted (with the same) in every way.

Chunilal and Fulkore accordingly carried on the business of the testator in his name as the Firm of Gordhandas Ambaidas for some time and having incurred liabilities in the course of their management they mortgaged with possession a ginning factory of the testator to one Jethabhai Kevaldas for Rs. 13,000. The

⁽¹⁾ (1883) 13 L. R. Ir. 45 at p. 52.

mortgage was dated 29th February 1899 and was executed by Fulkore and her daughter Rukhmini. They executed the document by affixing their marks, and their names were written by Chunilal. The document denied the fact of the will in the following terms :—

Further we have not mortgaged, sold or made a gift of the said property to any other person. Similarly the deceased Gordhandas Ambaidas also has not made a gift of, or sold the said mortgaged property or any other property belonging to himself. nor has the said deceased made even any will of his own property. Consequently no person other than ourselves has a right (and) claim to the same; nor has any one a part or share therein. In spite of this should any mortgagee, claimant or co-sharer or any other person come forward and lay claim or title, we shall be duly responsible for the same.

The signatures of the two ladies were written thus :—

The signature of Bai Fulkore, widow of Gordhandas Ambaidas and owner of the Firm of Gordhandas Ambaidas : I agree to what is written above. The handwriting is that of Chunilal Tribhuvandas. The signature is made at the request of the Bai; and the Bai has made the mark with her own hand.

The signature of Bai Rukhmini, daughter of Gordhandas Ambaidas. I agree to what is written above. The handwriting is that of Chunilal Tribhuvandas. The signature is made at the request of the Bai, and the Bai has made the mark with her own hand.

In the year 1900 the mortgagee Jethabhai brought a suit, No. 158 of 1900, on the mortgage against Fulkore and Rukhmini and also against Chunilal as executor of the will of Gordhandas to recover the mortgage-debt and while the said suit was pending Rukhmini brought a suit, No. 171 of 1900, against the mortgagee Jethabhai for the cancellation of the mortgage on the ground that it was not binding on her or her sons. The latter suit was dismissed. While the mortgagee's suit was pending, defendant Chunilal died and the mortgagee obtained a decree against Fulkore and Rukhmini for the recovery of the mortgage-debt, namely Rs. 13,000, from the surviving defendants and, in default of payment by them within six months, by the sale of the mortgaged property. The decree was dated the 21st November 1902.

On the 23rd August 1903 Chotalal and Maganlal, the two grandsons of Gordhandas, brought the present suit against Jethabhai, alleging *inter alia* that the defendant had knowledge

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of the fact and the contents of the will of Gordhandas because he was instrumental in getting it executed, that the defendant's conduct in taking the mortgage from the two ladies was fraudulent and that the plaintiff further impeached the mortgage because (1) it was not for a consideration binding on the estate of the testator, (2) the will gave no power to any one to make such alienation to the detriment of the plaintiffs' reversionary rights and (3) the plaintiffs' maintenance depended upon the mortgaged factory and there was no other property available for the purpose.

The plaintiffs, therefore, prayed for a declaration that the property was not liable to be sold under the defendant's mortgage decree and for an injunction restraining the defendant from selling the property, or in the alternative, if the sale was allowed to take place, for a declaration that the sale was to hold good only during the life-time of Fulkore and even then was subject to the plaintiffs' right for maintenance and that after Fulkore's death, the plaintiffs were the full owners of the property.

The Court of first instance, the District Court and the High Court, having declined to grant an interlocutory order staying the sale, the property was sold pending the hearing of the suit and was purchased by the defendant. Owing to this circumstance, the plaintiff asked for a further declaration that the defendant had obtained by his purchase no right against the plaintiffs' aforesaid rights in the property.

The defendant answered *inter alia* that the plaintiffs' mother Rukhmini having failed in her suit, No. 171 of 1900, which she had filed for herself and on behalf of her minor sons (the present plaintiff-) for the cancellation of the mortgage, the present suit was not filed by the plaintiffs in good faith and they should not be allowed to prosecute it, that the defendant had merely attested the will of Gordhandas and did not know the contents thereof, that Chunilal, Fulkore and Rukhmini fraudulently concealed the will and represented to the defendant, that the will was destroyed by the deceased during his life-time, that the deceased was indebted at the time of his death and for the purpose of paying off his debts as well as those incurred after his death Fulkore

and Rukhmini borrowed Rs. 13,000 from the defendant on the mortgage of the factory, that the mortgage-debt being incurred by Chunilal, Fulkore and Rukhmini for carrying on the trade and for the benefit of the family was valid, that it was not true that the plaintiffs had no means of subsistence and that the claim was time-barred.

The Subordinate Judge found that the suit was not time-barred as the plaintiffs were minors when the suit was filed, that the mortgage transaction was not brought about by any fraud on the part of the defendant, that the decree in the defendant's suit, No. 158 of 1900, was binding on the plaintiffs so far as their rights were concerned under the will and was also binding on the estate of the testator, that the defendant was informed that the will had been destroyed, that the suit was brought in good faith, that the defendant was an alienee who took in good faith and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed.

On appeal by the plaintiffs the District Judge found that the mortgage was not valid. He therefore reversed the decree and granted relief to the plaintiffs in the following terms :—

I reverse the finding of the lower Court and grant the declaration sought for, *viz.*, that the alienation to defendant holds good only during the life-time of Fulkore, and is subject to plaintiffs' right of maintenance, that plaintiffs are the full owners of the property and that defendant had obtained by his purchase no rights against the plaintiffs' above-mentioned rights in the property.

In view of the fact that I have found that the defendant was not a party to the fraud and was without notice of the will, and that he is not to blame for the injustice done to the minors, I think it would be hard to saddle him with the costs of this suit. I therefore direct that each party should bear its own costs.

In the judgment the District Judge made the following observations :—

From the evidence recorded it appears that Gordhan owed some money at the time of his death, and that after his death further large liabilities were incurred by Fulkore and Chunilal in the conduct of his business. The will contains a prohibition of alienation, but it also contains a direction to carry on the testator's business but not as to incur a loss.

In this connection reference is made on behalf of appellants to Williams on Executors (9th edition), Volume 2, pages 1664, 1681, 1684, 1815, 1900.

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It is argued that the executor who carries on the business of the testator makes himself personally liable for all debts so contracted and it makes no difference that he avowedly acts as executor (page 1816). The remedy of a creditor of the business for a debt incurred since the death of the testator is against the executor personally and not against the estate of the deceased. But when the executor properly carries on the business of the deceased, he is entitled to be indemnified out of the assets, which are authorized to be, or can be otherwise properly applied for the purposes of the business (page 1900).

Again executors have no authority in law to carry on the trade of the testator and if they do so, unless under the protection of the Court of Chancery, they run great risk, even though the will contains a direction that they should continue the business of the deceased. If the trade be beneficial the profits are applicable to the purposes of the trust and if it proves a losing concern the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death (page 1682). In the present case we have a direction in the will that the executors should carry on the business of the testator, but on page 1689 of Williams there is a case reported very similar to the present one (*M'Neilie v. Acton* 4 De G. M. and G. 744) in which it was held that a direction in a will that the testator's trade shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate, not employed at his death in the trade, for the purposes of carrying it on.

It might be argued that in the present case the ginning factory was employed in the trade, but in view of the prohibition of alienation in the will and of the principles referred to above, I think that Fulkore as executor had no authority to mortgage the property in dispute for the debts incurred in carrying on her husband's business, and though the transaction may be binding on her, a point which has been already judicially decided and with which we are not now concerned, in my judgment she had no authority as executor to bind the minors and, viewed from this standpoint, the transaction is not binding on them.

The defendant preferred a second appeal.

Coyaji with *L. A. Shah* for the appellant (defendant).

Setalvad with *M. N. Mehta* for the respondents (plaintiffs).

SCOTT, C. J.:—The material facts of this case are as follows:—Gordhan Ambaidas died in June 1896 leaving him surviving his wife Fulkore, his daughter Rukhmini, her husband Chunilal and two grandsons, children of Chunilal.

By his will, dated the 27th of May 1896, he appointed Chunilal and Fulkore his executor and executrix and, after charging his estate with the maintenance of his widow, daughter and grandsons and providing for the performance of certain funeral ceremonies, directed that his business in cotton, cotton-seed and cotton-ginning should, in order to perpetuate his name, be carried on by Chunilal so long as it could be carried on at a good profit but should it appear that the trade would suffer so as to destroy his reputation Chunilal should stop it. The testator then gave his widow Fulkore a life-interest in all his property with a prohibition against alienation with remainder as to his property which might remain over after her death to his grandsons.

At the time of his death the testator possessed *inter alia* a cotton-ginning factory at Sabergaum in the Surat District which was used in his business.

After his death Chunilal and Fulkore carried on the business in the testator's name. In February 1899 having, as is found by the lower appellate Court, incurred large liabilities in the conduct of the business they mortgaged the ginning factory with possession to the defendant Jethabhai for Rs. 13,000 and interest thereon at 9 per cent. per annum. The mortgage, in consequence perhaps of a desire on the part of Chunilal to escape liability as a mortgagor, was executed by Fulkore described "as owner of the firm of Gordhandas Ambaidas dealing in cotton" and Rukhmini described as "daughter of Gordhandas Ambaidas of the same estate." The ladies executed the mortgage by affixing their marks, and their names were written by Chunilal. The mortgage was attested by four witnesses.

The mortgage stated that the deceased Gordhandas had not made any will of his property and consequently no one but the ostensible mortgagors had any right or claim to the same. The consideration was stated to be received as follows:—Rs. 6,909-3-3 claimable by the firm of Motibhai Ambaidas from the firm of Gordhandas Ambaidas paid off by the defendant; Rs. 2,709 claimable by Jagjivandas Bhagwandas from the aforesaid firm paid by the defendant; Rs. 764-8-0 claimable by Motibhai Lalbhai from the said firm paid by the defendant; and Rs. 2,616-4-9 received in cash in order to pay off other debts of the firm.

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The lower appellate Court has found that the consideration was paid substantially as stated in the mortgage-deed and that the defendant was deceived by the misrepresentations of Fulkore, Chunilal and Rukhmini into the belief that the will of the testator had been destroyed.

In the year 1900 the defendant brought a suit on the mortgage against Fulkore and Rukhmini, Chunilal being joined as a defendant as executor under the will. About the same time Rukhmini, without joining her sons as parties, sued the present defendant for a declaration that the mortgage did not affect her rights or those of her sons. Her suit was dismissed for want of parties, but in the mortgagee's suit a decree was in November 1902 passed in favour of the present defendant against Fulkore and Rukhmini, Chunilal having died *pendente lite*. The decree was for payment of Rs. 13,551 and interest at 9 per cent. per annum and costs, and in default of payment within six months, for sale of the mortgaged property. It was confirmed on appeal to this Court. The property was sold under the decree and was purchased by the mortgagee for Rs. 11,000, leaving a balance due to him of upwards of Rs. 8,000. The present suit was instituted by the sons of Chunilal before the sale took place praying for a declaration that the property was not liable to be sold under the mortgage decree and for an injunction restraining the defendant from selling the property or in the alternative, if the sale was allowed to take place, then for a declaration that the alienation was to hold good only for and during the life-time of Fulkore and even then was subject to the plaintiffs' right of maintenance and that after Fulkore's death the plaintiffs were the full owners of the property.

As the Court of first instance, the District Court and this Court successively declined to grant an interlocutory order staying the sale, the plaintiffs added a prayer for a further declaration that the defendant has obtained by his purchase no rights against the plaintiffs' rights in the property. In the first Court the Subordinate Judge dismissed the suit, but in the District Court the decree was reversed and a declaration was made that the alienation holds good only during the life-time of Fulkore and is subject to the plaintiffs' right of maintenance,

that the plaintiffs are the full owners of the property, and that the defendant has obtained by his purchase no rights against the plaintiffs' rights in the property.

From this decree the defendant has appealed.

Although both Fulkore and Chunilal were joined as party defendants to the mortgage suit, it has not been contended that the estate and the beneficiaries are bound by the mortgage decree.

For the respondent it has not been suggested that the continuance of the business was unauthorised in the events which had happened. Chunilal was indeed under the will the only person who could decide whether or not the business should be stopped.

It is well established that an executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee.

In *Ex parte Garland*⁽¹⁾ Lord Eldon, discussing the position of an executor carrying on his testator's trade under such a trust, said: "The case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property; also, in his person; and as he may be proceeded against, as a bankrupt; though he is but a trustee. But he places himself in that situation by his own choice; judging for himself, whether it is fit and safe to enter into that situation, and contract that sort of responsibility.....As to creditors, subsequent to the death of the testator.....it is admitted, they have the whole fund, that is embarked in the trade; and in addition they have the personal responsibility of the individual, with whom they deal; the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate, embarked in the trade. They have not a lien upon anything else: nor have creditors in other cases a lien upon the effects of the person, with

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(1) (1804) 10 Ves. Jun. 110 at pp. 119-120.

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whom they deal ; though, through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien."

Ex parte Butterfield ⁽¹⁾ shows that the introduction into the business by the trustee executor of a co-executor not authorised to carry on the trade does not affect the rights of the trade creditors. In that case a sole trader directed by his will that it should be lawful for his widow to employ £6,000 in continuing his business and he appointed her and his son executors. After the testator's death his widow and son continued his business and became bankrupt. A person beneficially interested in the assets which had been employed by the bankrupts sought to prove in respect thereof against their joint estate but it was held that to the extent of £6,000 no such proof could be allowed, for the employment of the £6,000 was authorised by the will.

The nature of the trade creditor's right against the assets properly employed by a trust trader is thus stated by Sir George Jessel in *In re Johnson* ⁽²⁾: "The creditor who trusts the executor has a right to say 'I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets ; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.' The first right is his general right by contract, because he trusted the trustee or executor : he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities ; . . . the Court puts the creditor, so to speak, as I understand it, in the place of the trustee."

In *Strickland v. Symons* ⁽³⁾ Lord Selborne, referring to *Ex parte Garland* and *Ex parte Johnson*, states the principle to be that the trustee though personally liable for the debts which he

⁽¹⁾ (1847) De Gex. 570.

⁽²⁾ (1880) 15 Ch. D. 548 at p. 552.

⁽³⁾ (1884) 26 Ch. D. 245 at p. 248.

contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned.

If this principle is borne in mind, a brief re-statement of the main facts of this case will show that the plaintiffs' suit must fail.

Chunilal, the trust trader, in conjunction with his co-executrix Fulkore, lawfully carries on the testator's business and employs therein the trade assets. In order to pay off trade debts he obtains money from the defendant on the security of the ginning factory used in the business. The ginning factory is worth less than the sum advanced by the defendant. The plaintiffs, as beneficiaries of the testator, seek to deprive the defendant of the benefit of the assets so come into his possession.

The argument advanced on behalf of the plaintiffs was really an attempt to take advantage of the fraud perpetrated on the defendant by the plaintiffs' father who was personally liable for the debts which the defendant was induced to pay off. It was argued that the defendant took nothing by the mortgage since the ostensible mortgagors as widow and daughter took no interest in the property, Gordhandas having died testate: that Fulkore's interest as beneficiary under the will was subject to a restraint upon alienation: and that as executrix she could only mortgage the testator's property in conjunction with her co-executor Chunilal because she had not taken out probate and so could not act alone under section 92 of Act V of 1881. In our opinion the existence of the mortgage-deed strengthens rather than weakens the defendant's case.

The mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner Chunilal who had the implied authority of the testator to deal with the ginning factory in the ordinary course of business. The mortgage was therefore valid and binding on Chunilal as principal: see *Juggeewundas Keeka Shah v. Ramdas Brijbookun-Das*⁽¹⁾. A mortgage by a trader under a testamentary trust of

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the testator's factory is referable to his implied authority as a trustee and not to his position as executor. See the judgment of May, C. J., in *Devitt v. Kearney*⁽¹⁾.

We set aside the decree of the District Court and dismiss the suit with costs throughout on the plaintiffs.

Decree set aside.

G. B. R.

(1) (1883) 13 L. R. Ir. 45 at p. 52.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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SIVLAL JETHABHAI, PLAINTIFF, v. BHIKHA RAMJAN, DEFENDANT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), sections 12 and 13—Retrospective effect—Indebtedness existing at the date of the passing of the Act as well as future indebtedness.

The plaintiff sued to recover from the defendant a certain sum due on a money bond, dated the 17th May 1904. The suit was cognizable by the Court in its Small Cause jurisdiction. The bond sued on was passed in adjustment of an existing debt which itself was the balance due on previous advances. Some of the provisions including sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were made applicable to the district on the 15th August 1905 and the present suit was filed on the 26th March 1909. As the several advances which led to the bond were prior in date to the application of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the district, the following question arose:—

“Whether section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is retrospective so as to apply to the case of transactions entered into before the date of its extension to the district but the suit in respect of which is instituted after that date?”

Held in the affirmative that section 13 of the Act is retrospective.

Sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness.

* Civil Reference No. 5 of 1909.

REFERENCE under Order XLVI, Rule I of the Civil Procedure Code (Act V of 1908), by J. N. Bhatt, Subordinate Judge of Borsad in the Ahmedabad District.

Small Cause suit.

The plaintiff sued the defendant, who was an agriculturist, to recover Rs. 48 including interest due on a money bond for Rs. 31, dated the 17th May 1904, passed in adjustment of an existing debt. The original advances amounted to Rs. 21-8-9 in 1896 and they were followed by further advances.

Section 13 and several other sections of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were extended to the Ahmedabad District on the 15th August 1905 and the present suit was instituted on the 26th March 1909.

As the advances which resulted in the passing of the bond were made before the application of sections 12 and 13 of the Act to the Ahmedabad District, the Subordinate Judge referred the following question for an authoritative decision under Order XLVI, Rule I of the Civil Procedure Code (Act V of 1908):—

“Whether section 13 of the Dekkhan Agriculturists' Relief Act is retrospective so as to apply to the case of transactions entered into before the date of its extension to this district but the suit in respect of which is instituted after that date?”

The opinion of the Subordinate Judge was in the affirmative. In making the reference he observed as follows:—

If section 13 were to apply and account taken in the manner laid down by it the plaintiff cannot recover more than Rs. 26-8-0. If it were not to apply, the plaintiff would be entitled to recover Rs. 48, the full amount of the claim.

The plaintiff's pleader relying on I. L. R. 31 Bom. 630 contends as follows:—

1. As section 13 of the Dekkhan Agriculturists' Relief Act is held not to be retrospective, it cannot apply to the case of a transaction entered into before the date of its extension to this district, notwithstanding the fact that the suit was instituted considerably after the date of the extension of the section. The Full Bench ruling in I. L. R. 31 Bom. 630 decides that the last sixteen words in section 12 of the Dekkhan Agriculturists' Relief Act ‘and secondly with a view to taking an account between such parties in manner herein-after provided,’ and sections 13 and 71A are not retrospective and do

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not apply to suits instituted before the Dekkhan Agriculturists' Relief Act came into force. This is the rationale of the decision as appears from the fact that when the case was being argued, Chandavarkar, J., remarked that the sections in question did not merely affect procedure but that they affected rights and so could not have retrospective effect. Knight, J., also said that the taking of account might be a matter of a procedure but that the enforcing of accounts was not. These remarks in effect upheld the opinion of the Subordinate Judge at Thana to the effect that the provisions in question should not have "retrospective effect or apply to pending suits," as the creditor had certain vested rights under the law in force before the extension of the Dekkhan Agriculturists' Relief Act.

2. There is no reason why the case of a pending suit should be distinguished from one in respect of which no suit was pending, if the transactions in both the cases were entered into before the date of the application of the Act. Broom in his Legal Maxims (page 24, 7th Edition) when discussing the maxim "*Nova constitutio futuris formam imponere debet non præteritis*" says that "every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past, must be deemed retrospective in its operation." This is the meaning of the word retrospective. There is no reason, therefore, why L. L. R. 31 Bom. 630 should not apply to this case.

3. Even a statute against wagering contracts was held not to apply retrospectively to such contracts entered into before the statute came into force, as appears from the following passage at page 211 in I. L. R. 2 Bom. 148 :—

"Hence in *Moon v. Durden* (2 Ex. 22) the majority of the Court held that a right of action fully acquired before the passing of the Wager's Act was not extinguished by the words, 'no action shall be brought or maintained' on a wager. The public interest was manifestly the motive of the law, yet as between private parties it was not allowed to affect the consequences of acts not at the time they were entered on, forbidden, and capable in themselves at the time of generating a legal right and corresponding obligation."

4. On the analogy of rules contained in clauses C and E and the last paragraph of section 6 of the General Clauses Act (X of 1897) the plaintiff has a vested right to have his case decided according to law as it existed before the coming into force of sections 12, 13 and 71 A of the Dekkhan Agriculturists' Relief Act in this District.

The defendant who is in gaol was not represented by a pleader, owing probably to poverty. The Government Pleader represented the plaintiff. As *amicus curiæ* Mr. Bhanabhai argued the case for the defendant as follows:—

1. The ruling in question (I. L. R. 31 Bombay 630) is not correct. Looking to the course of decisions as to the retrospectivity of section 174 of the Bengal Tenancy Act, time would come for overruling this decision. The question whether section 174 of the Bengal Tenancy Act was retrospective, was first answered in the negative by a Full Bench of the Calcutta High Court in I. L. R. 14 Cal. 636 on the ground that that section conferred upon judgment-debtors a new right which they did not possess under the old Act. But this decision was held wrong by another Full Bench in I. L. R. 22 Cal. 767 which also upset another Full Bench ruling in I. L. R. 21 Cal. 940 as to section 310A of the old Code of Civil Procedure not being retrospective. Thus both section 174 of the Bengal Tenancy Act and section 310A of the Civil Procedure Code were ultimately held to be retrospective.

2. In I. L. R. 25 Bom. 104 it is said that section 310A of the Civil Procedure Code had been drafted on the lines of section 174 of the Bengal Tenancy Act VIII of 1885 which has been passed "in the interest of another unfortunate class; the poor tenure holders whose lands were liable to be sold for arrears of rent." In the Full Bench ruling of I. L. R. 14 Cal. 636 it was said that if the language used had contained a direct implication as to the intention of the legislature to make it retrospective, it would have been so interpreted. Though on the one hand Mr. D. A. Khare argued before the Full Bench in I. L. R. 31 Bom. 630 that section 12 of the Dekkan Agriculturists' Relief Act mixed procedure and rights so inextricably that it was not possible to separate the one from the other and to give retrospective effect to it, it may be argued on the other hand that this inextricable mixing of the two amounts to a direct implication of the kind mentioned in the Full Bench ruling in I. L. R. 14 Cal. 636. If the legislature in order to relieve agriculturists directs the history and merits of their cases to be gone into for two purposes and if the history of a case implies an inquiry into the past why should it be supposed that it intended such an inquiry for one purpose in the case of contracts and other transactions entered into before the extension of the Act and for both the purposes in the case of contracts and other transactions entered into after the extension of the Act.

3. No doubt the general rule is that a statute is not to be retrospectively enforced. There is, however, another principle referred to by West, J., in a case under the Dekkhan Agriculturists' Relief Act (I. L. R. 8 Bom. 340) which requires to be considered—the principle "that a law passed to promote some important public interest may be given on that account a retrospective operation if necessary, as the rule against such operation rests itself on such a general public interest, which may, under the circumstances be deemed of less importance than the one embodied in the statute." The learned Judge adds: "The purpose of the Dekkhan Agriculturists' Relief Act was undoubtedly to shield the property of agriculturists against their creditors and this purpose we cannot but see was considered

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by the Legislature one of great public importance. Thus only are the anomalous provisions of the Act to be accounted for. Such a purpose so manifested we cannot suppose to have extended only to the cases of attachments made after the Act had come into force. No intelligible reason could we think be assigned for such a distinction" (p. 347). In 7 Bom. L. R. 497 at page 518 Batty, J., refers to the passage and says when the maxim *Salus populi suprema lex* applies and the aim of an Act is to promote important public interests, private interests may justifiably be subordinated and a construction necessary to effectuate the intention of the Legislature must be given effect thereto. In the case of the Dekkhan Agriculturists' Relief Act the point was not whether it created new rights but whether expressly or by direct implication the legislature intended both the things mentioned in section 12 thereof to be done retrospectively or only one of them.

4. The ruling in question (I. L. R. 31 Bom. 630) was arrived at in the case of a pending suit and so it cannot apply to a case like the present where the suit was instituted after the coming into force of section 13. The plain meaning of this section is to affect all transactions whether made before or after the Act came into force. But there is nothing to clearly show that it was intended to operate in pending suits.

These arguments give rise to the following question :—

Whether section 13 of the Dekkhan Agriculturists' Relief Act is retrospective so as to apply to the case of transactions entered into before the date of its extension to this district but the suit in respect of which is instituted after that date?

The question thus formulated does not appear to me free from doubt and difficulty, but as it is very important as affecting the interests of agriculturists and is likely to arise now and then, with diffidence I venture to submit it with the following observations:

The important question for consideration seems to be: what does I. L. R. 31 Bom. 630 actually decide? Does it decide that the last sixteen words of section 12 and section 13 and 71 A of the Dekkhan Agriculturists' Relief Act are absolutely non-retrospective or does it decide that they are only partially non-retrospective so as not to apply to the case of a pending suit. The case was one of a pending suit. All that their Lordships said during the course of the argument or in the judgment had reference to this case of a pending suit. That a statute may be only partially retrospective appears from the following passage in Maxwell on the Interpretation of Statutes (4th Edition, 1905, page 322):—

"For it is to be observed that the retrospective effect of a statute may be partial in its operation. Thus it has been said that section 35 of the Divided Parishes Act, 1876, which contains a code of transmitted status in relation to settlement, is to be considered as fully retrospective for all purposes, except

only as regards adjudications made before the commencement of the Act: so that for the purpose of determining the settlement of children born after 1876, it may be that their father's settlement is governed by the section even though his settlement for the purposes of his own removal is not affected by it."

Again West, J, in *In re Ratansi Kallianji* and others (I. L. R. 2 Bombay 148) at page 210, says:

"The general principle of non-retroactivity of new laws need not be insisted on. On the other hand there is in one sense an element of retroactivity in all laws since no law can operate except by changing or controlling what would else have been different capabilities or a different sequence of acts and events having their roots and motives in the past. It would be more important for practical purposes to distinguish if possible the cases and the senses in which the loosely expressed principle does and does not apply and to ascertain the exceptions to which it is subject. That, as has occasionally been argued, there is something universally and essentially wrong and unjust in retrospective laws is not to be admitted. The principle has indeed been accepted as a fundamental one in the written constitutions of some states, but it is properly rejected by Willes, J., in the case of *Phillips v. Eyre* (L. R. 6 Q. B., p. 23) and by Dr. Lushington in the "*Ironsides*." For the legislator the question is always one of the higher as against the lower or of the general against the particular interest. For the judges the question is simply as to the true intention of the Legislature."

There is the further rule "that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain" (Maxwell on the Interpretation of Statutes, p. 322, 4th edition, 1905).

Applying these principles to the section in question it appears that though the words of it convey that the section is meant to have retrospective effect they do not show whether it was meant to include cases of pending suits. Courts are reluctant to extend the application of a statute or its section to the case of a pending suit unless it clearly appears that it was the intention of the legislature to so apply it. The Legislature may intend a section to operate retrospectively and yet may not intend it to operate on pending suits. Section 13 of the Dekkhan Agriculturists' Relief Act appears to be a section of this type. In my opinion I. L. R. 31 Bom 630 while deciding that the last sixteen words of section 12 and sections 13 and 71 A do not apply to pending suits leaves their retrospectivity otherwise untouched notwithstanding the fact that the Subordinate Judge and their Lordships of the High Court during the course of the argument made general remarks to the effect that the sections were not retrospective. Though their remarks were general it cannot be forgotten that they were made in relation to the case of a pending suit.

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The fact that a particular statute or a section if it is retrospective will not necessarily make it applicable to the case of a pending suit. The question would still have to be considered whether it is so far retrospective as to apply to pending suits. If there is no such intention appearing section 6 of the General Clauses Act will apply if the new enactment repealed any existing one. If the new enactment altered any existing law without repealing any enactment the principle of law enunciated in the *Gujrat Trading Company v. Trikarnji Velji* (3 Bom. H. C. R. 45) and followed in 10 Bom. L. R. 625 will apply. In the last case the ruling in *Fatamabibi v. Ganesh* (I. L. R. 31 Bom. 630) seems to have been interpreted as deciding no more than that the last sixteen words of section 12 and sections 13 and 71A are not retrospective so as to apply to a suit instituted before the Act came into force in the particular district (p. 636); thereby the meaning is conveyed that they are otherwise retrospective. If the view of their Lordships in 10 Bom. L. R. 625 had been that I. L. R. 31 Bom. 630 decided that these sections were absolutely non-retrospective there would have been no necessity to set aside the order of the lower Court permitting withdrawal of the suit.

In I. L. R. 17 Bom. 289 a question arose whether section 31, clause 2, of the Talukdars' Act (Bombay Act VI of 1888) was retrospective in operation. In this case a decree upon a mortgage bond was passed on 15th August 1887. The property was sold on 5th August 1889 but the Collector refused to confirm the sale for want of sanction of the Governor, the Talukdars' Act having come into force on the 25th March 1889. The High Court held that the section was not retrospective and that the sale should be confirmed though no sanction had been obtained.

In I. L. R. 19 Bom. 80 which also is a case on the same section of the Talukdars' Act the mortgage was executed before the Act came into force, but a decree for sale was passed after its coming into force. It was held that no sanction of the Governor was necessary.

In I. L. R. 20 Bom. 565 the correctness of the above ruling was doubted. It was however explained and its correctness maintained by Ranade, J., in I. L. R. 22 Bom. 884 on the ground that it was presumably the case of a pending suit. In the last mentioned case the mortgage was executed in 1883 and a suit on the mortgage was brought in 1893. The District Court held that section 31, clause 2, of Bombay Act VI of 1888 did not apply as the mortgage was effected prior to the passing of the Act and so passed an order absolute for the sale of the mortgaged property. The High Court reversed the order holding that the section did apply. The case in I. L. R. 19 Bom. 80 was assimilated to the class of cases referred to in I. L. R. 17 Bom. 289 on the ground that the suit in I. L. R. 19 Bom. 80 was presumably instituted before the date of the application of the Act. Ranade, J., observed —

There is no particular reason to distinguish cases in which a decree has been obtained from those in which proceedings had been presumably instituted before the Act came into force. In *Doolubdass v. Ramlohl* (5 Moo. I. A. 109)

their Lordships of the Privy Council had to consider how far retrospective effect could be given to the provisions of an Act of 1848 which declared that 'all agreements by way of wager shall be null and void' and it was held that this prohibition did not affect the validity of existing contracts *at all events not those contracts on which actions had already been brought before the new Act came into force*..... (The italics are mine.) In *Shah Kalidoss v. Chudasama* (P. J. for 1895, p. 428) as the encumbrance was of a date prior to the Act but the suit was instituted long after the Act came into force, a decree was passed for the amount due, but its enforcement by sale of the property was made subject to the provisions of section 89 of the Transfer of Property Act which would, it was observed, make it possible for the creditor to obtain the sanction of Government before the sale actually took place "

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The above decisions on section 31, clause 2, of the Talukdars' Act show that though the section was expressly held not to be retrospective by one Bench, it did not come in the way of another Bench holding subsequently that the section did apply to a case in which the suit was instituted after the coming into force of the Act though the transaction sued on was of a date anterior to its coming into force.

On the strength of these decisions it may be argued that though section 13 of the Dekkhan Agriculturists' Relief Act is held not to be retrospective in I. L. R. 31 Bom. 630 the decision would be no bar to the applicability of the section to the case of a transaction which, though entered into prior to the coming into force of the section in this district, was sued on after its coming into force.

For the above reasons I think that the ruling in I. L. R. 31 Bom. 630 does not come in the way of answering the question I have framed in the affirmative.

If however my interpretation of the ruling in 31 Bombay be not correct and it be interpreted as deciding that section 13 of the Dekkhan Agriculturists' Relief Act is absolutely non-retrospective the arguments in favour of the retrospectivity of the section appear to be very cogent and it is for their Lordships to consider whether another Full Bench should not intervene. Under this latter interpretation it seems difficult to make a distinction between two cases of contracts both of which are entered into, say, a year before the coming into force of a section authoritatively ruled to be a provision not of procedure law but of substantive law but one of which was sued on the day preceding, and the other on the day of, the coming into force of the section. To make myself more clear, suppose a provision of substantive law comes into force on August 1st, 1905. A suit is filed against B by A on July 31st, 1905, and another against C on August 1st, 1905. The contracts with B and C both were entered into on 1st September 1904. The High Court in the former case rules that the provision is of substantive law and affects a vested right, therefore the new law cannot operate retrospectively. The rationale of this ruling is that A and B contracted on 1st September 1904 with reference to a particular state

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of things. They did not know that the interest agreed to could be cut down. Does not the same reasoning apply to the case of A and C who also entered into a similar contract on 1st September 1904?

According to the usual canons of construction governing such enactments as the Dekkhan Agriculturists' Relief Act everything must be done in advancement of the remedy consistently with the plain language of the Legislature so as to afford the utmost relief which the meaning of the language can allow. It appears from the ruling in 10 Bom. L. R. 745 that section 13, Dekkhan Agriculturists' Relief Act, has of necessity to be applied to all cases the history and merits of which have been inquired into under section 12 of it. Thus the application of the two sections is co-extensive. If this view is correct there is a conflict between it and the ruling that the last sixteen words of section 12 and sections 13 and 71A are not retrospective.

On a consideration of the arguments for the plaintiff and the defendant and for the reasons above set forth, I would answer the question framed in the affirmative.

The reference was argued before Sir Basil Scott, C. J., and Batchelor, J.

T. R. Desai (amicus curie) for the plaintiff:—So far as pending suits are concerned this Court has, in its Full Bench ruling in *Fatmabibi v. Ganes*⁽¹⁾, held that the last sixteen words of paragraph 2 of section 12 of the Dekkhan Agriculturists' Relief Act are not retrospective. We submit that section 12 applies only to transactions entered into after the provisions of the Act were extended to the Ahmedabad District. There are no decided cases either way, therefore reference will have to be made to the canons of construction of a statute. The Privy Council have held in *Doolubdass v. Ramlohl*⁽²⁾, which was a case of wager, that a new statute cannot affect a transaction entered into before it was enacted, at any rate it cannot affect a transaction in respect of which a suit is already brought. In the above case, the suit was brought before the particular Act was enacted but therein there is an expression of general opinion that anterior transactions are not to be affected. The observations in *Moon v. Durden*⁽³⁾ are to the same effect. We rely on section 6 of the General Clauses Act, 1895. We have a vested right to get a

(1) (1907) 31 Bom. 630.

(2) (1850) 5 Moo. I. A. 109.

(3) (1848) 2 Ex. 22.

decree on our *khata* and no new statute subsequently passed can divest us of that right. No distinction can be made between (1) the case of a transaction admittedly entered into before the Act came into operation and (2) one in respect of which a suit is brought after the enactment of the Act. Relying on the decision of the Full Bench in *Fatmabibi v. Ganesh*⁽¹⁾ we submit that section 12, clause 2, of the Dekkhan Agriculturists' Relief Act is not retrospective and the point referred to should be answered in the negative. The following cases were cited :—

In the matter of the petition of Ratansi Kalianji⁽²⁾, *Javxmal Jitmal v. Muktabai*⁽³⁾, *Manohar Ganesh v. Chutabhai Mithabhai*⁽⁴⁾, *Kalian Moti v. Pathubhai Faljibhai*⁽⁵⁾, *Taylor v. Manners*⁽⁶⁾ and *Phillips v. Eyre*⁽⁷⁾.

G. N. Thakore (amicus curiæ) for the defendant :—The ruling of the Full Bench in *Fatmabibi v. Ganesh*⁽¹⁾ gave rise to the present question. Therefore it is necessary to see what that case really decides. The reference to the Full Bench was made because there is an apparent conflict between the decisions of this Court in *Pannalal v. Kalu*⁽⁸⁾ and *Suryaji v. Tukaram*⁽⁹⁾. The last case decides that sections 12 and 13 of the Act are applicable only to suits instituted on or after the 1st November 1879 and the former case was supposed to be in conflict with it. The Full Bench held that sections 13 and 71A and the last sixteen words of section 12, clause 2, did not apply to suits instituted before the Act came into force and read *Pannalal v. Kalu*⁽⁸⁾ as indicating a similar construction of the law. The question of the applicability of the Act to anterior transactions was not before the Full Bench and the language used is to be read in the light of the question submitted for decision.

To argue from this that the Act did not apply to anterior transactions is to take a long stride. Pending suits stand on a footing of their own. They are always governed by the law

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(1) (1907) 31 Bom. 630.

(2) (1877) 2 Bom. 148.

(3) (1890) 14 Bom. 516.

(4) (1884) 8 Bom. 347.

(5) (1892) 17 Bom. 289.

(6) (1865) L. R. 1 Ch. 48.

(7) (1870) L. R. 6 Q. B., p. 23.

(8) (1906) 8 Bom. L. R. 798.

(9) (1890) 4 Bom. 358.

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obtaining at the date of their institution: *Gujarat Trading Company v. Trikamji Velji*⁽¹⁾. They are understood to have the same force as a decree: *Chudasama Naudhabhai v. Naran Tribhovan*⁽²⁾. The rights created by a decree are of the highest kind and infinitely superior to those created by a contract: *Nailu v. Raghu*⁽³⁾, *Tatya v. Bapu*⁽⁴⁾. It cannot therefore be urged that because the Act does not apply to pending suits, it cannot also apply to past transactions.

Apart from the Full Bench ruling the present case is quite clear. There is no ruling against the view we contend for. On the contrary this Court has always proceeded on the assumption that the Act applies to all transactions. Even the case of *Suryaji v. Tukaram*⁽⁵⁾ supports this contention. The cases of *Nailu v. Raghu*⁽³⁾ and *Tatya Vithoji v. Bapu Balaji*⁽⁴⁾ are further illustrations. In all these cases the transactions were of earlier dates, still the decisions rest on grounds other than that of the non-applicability of the Act to certain transactions. This is because the language is quite clear. The word 'history' in section 12 of the Act can only mean past history and the word 'commencement' is used without any word modifying its natural import. The preamble of the Act again clearly indicates the intention of the legislature which was to relieve the indebtedness, meaning thereby existing indebtedness. The supplementary definition of the word 'agriculturist' in clause (2) of section 2 also helps our contention. Both the language and the intention being clear, no canon of construction can help the plaintiff. The Act is to be construed as indicated in *Shivram Udaram v. Kondiba Muktaji*⁽⁶⁾. The cases of *Moon v. Durden*⁽⁷⁾ and *Doolubdass Pettamberdass v. Ramlohl Thackoorseydass*⁽⁸⁾ were both cases of pending suits. Those decisions went on the presumed intention of the legislature which was there quite different. The observations relied upon are *obiter dicta* and should be read with reference to the point for decision. We therefore submit that the question referred should be answered in the affirmative.

(1) (1867) 3 Bom. H. C. R. (O. C. J.) 45. (5) (1880) 4 Bom. 358.

(2) (1897) 22 Bom. 884.

(6) (1884) 8 Bom. 340.

(3) (1884) 8 Bom. 308.

(7) (1848) 2 Ex. 22.

(4) (1883) 7 Bom. 330.

(8) (1850) 5 Moo. I. A. 109.

Desai in reply :—The observations in *Manohar Ganesh v. Chutabhai Mithabhai*⁽¹⁾ cannot affect the present case, for they are in conflict with the view of the majority of Judges in *In the matter of the petition of Ratansi Kabanji*⁽²⁾. No doubt the object of the Act was to help agriculturists and relieve them from indebtedness but at the same time some consideration will have to be shown to creditors whose position becomes very hard under the Act.

SCOTT, C. J.:—We answer the question referred in the affirmative.

Sections 12 and 13 of the Dekkhan Agriculturists' Relief Act show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness. We understand this to mean indebtedness existing at the date of the passing of the Act as well as future indebtedness.

The point referred to us has never, so far as we have been able to ascertain, been raised during the last thirty years which have elapsed since the passing of the Act, and we know of no case which has been decided which is based upon any other reading of the Act than that indicated above.

We are indebted to the pleaders who have argued the case as *amici curiæ* with much keenness and have given great assistance to the Court.

Order accordingly.

G. B. R.

(1) (1884) 8 Bom. 347.

(2) (1877) 2 Bom. 148.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

1909.
November 6.

RAMRAV GOVINDRAO (ORIGINAL PLAINTIFF), APPELLANT, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS *

Revenue Jurisdiction Act (X of 1876), section 4, sub-section (a)†—Act XI of 1852—Land held as Saranjam—Decision of the Inam Commissioner—Finality—Suit for declaration of title and possession—Exclusion of jurisdiction of Civil Courts

In the year 1858 the Inam Commissioner decided that a certain estate was Saranjam of P. and not his Sarv Inam. On P.'s death in 1899 Government resumed the estate on the ground that it was Saranjam and re-granted it to V., one of P.'s grandsons. Subsequently the plaintiff, another grandson of P., brought a suit against the Secretary of State for India and V. for declaration of title and possession on the ground that the immovable property in suit was plaintiff's Sarv Inam property and could not be taken from his possession by Government or its officers or re-granted to any one else.

Held,

1. That the decision of the Inam Commissioner was, by virtue of the provisions of Rule 2, Schedule A of Act XI of 1852, final as regards the land and interests concerned in the decision.

* First Appeal No. 21 of 1909.

† Section 4, sub-section (a), of the Revenue Jurisdiction Act (X of 1876) runs thus:—

4. Subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters:—

(a) Claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act No. III of 1874, or any other law for the time being in force, or of any other village-officer or servant; or

Claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service; or

Suits to set aside or avoid any order under the same Act or any other law relating to the same subject for the time being in force passed by Government or any officer duly authorized in that behalf; or

Claims against Government relating to lands held under treaty, or to lands granted or held as Saranjam, or on other political tenure, or to lands declared by Government or any officer duly authorized in that behalf to be held for service,

2 That after such final decision, the title and continuance of the estate must be determined under Schedule B, Rule 10 of the Act, under such rules as Government may find it necessary to issue from time to time.

3. That in accordance with those rules the estate was, on P.'s death, resumed by Government who re-granted it to V.

Held, further, that the suit having been against Government relating to land as Saranjam was excluded from the jurisdiction of the Civil Courts by the provisions of sub-section (a) of section 4 of the Revenue Jurisdiction Act (X of 1876).

APPEAL from the decision of T. D. Fry, District Judge of Dharwar, rejecting the claim in Original Suit No. 3 of 1907.

Suit for a declaration of title and for possession of property.

The property in suit formed part of the estate known as Hebli estate in the Dharwar District. A question having arisen as to whether the estate was Saranjam or Sarv Inam, Major Gordon, the Inam Commissioner, decided in the year 1858 that it was Saranjam and not Sarv Inam. One Pandurangrao had a fourth share in the estate. On his death in 1899 the share was resumed by Government on the ground that it was Saranjam. After the resumption Government passed an order in the year 1902 re-granting the share to one Narsingrao. The Secretary of State for India, however, cancelled the said order and re-granted the share to Vithalrao, a minor grandson of Pandurangrao. Owing to the minority of the grantee, his property was managed by the Collector of Dharwar as guardian.

On the 15th August 1907 the plaintiff, another grandson of Pandurangrao, brought the present suit against the Secretary of State for India as defendant 1 and Vithalrao as defendant 2, for declaration of title and possession, alleging that the property was Sarv Inam and was held by his grandfather, Pandurangrao, as full owner and that the re-grant to Vithalrao was illegal.

The defendants contended *inter alia* that the property was Saranjam and not Sarv Inam, that the plaintiff had no cause of action regarding the resumption and re-grant made under the Saranjam Rules and that the suit was barred by section 4, clause (a), of the Bombay Revenue Jurisdiction Act (X of 1876).

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The District Judge found that under the provisions of section 5 and Rule 2 of Schedule A of Act XI of 1852 it was not open to him to question the declaration made by Government in their Resolution No. 676, J. D., dated the 6th March 1863, that the property in suit was Saranjam, the said declaration being final, and that he had no jurisdiction to entertain the suit under section 4 (a) of the Bombay Revenue Jurisdiction Act (X of 1876). He, therefore, dismissed the suit.

The plaintiff appealed.

K. H. Kelkar for the appellant (plaintiff).

G. S. Rao (Acting Government Pleader) for the respondents (defendants).

SCOTT, C. J.:—One Pandurangrao, the grandfather of the plaintiff and the second defendant, was the owner of one-fourth share of the Hebli estate in the Dharwar District. On his death in 1899, Government, on the ground that the property was Saranjam, resumed Pandurangrao's one-fourth share and granted it to Narsingrao. That order was cancelled by the Secretary of State and by his orders the property was granted to Vithalrao, the second defendant.

The Collector of Dharwar, as the guardian of Vithalrao, has taken the property into his possession, and the plaintiff, who claims to hold as one of the heirs of Pandurangrao on the footing of the estate being a Sarv Inam of Pandurangrao, sued the Secretary of State and Vithalrao for a declaration of title and for possession. He seeks to have it declared that the immoveable property in suit is the Sarv Inam property of the plaintiff and cannot be taken from his possession by Government or its officers or re-granted to any one else.

The question whether the Hebli estate was Sarv Inam or Saranjam, was decided by the Inam Commissioner, Major Gordon, in July 1858, under the provisions of Act XI of 1852. The Inam Commissioner then recorded his decision that the claimant's title (the claimant being an ancestor of the plaintiff) to hold Kasba Hebli in Sarv Inam was invalid, and he held that it was in fact a Saranjam property.

The decision of the Inam Commissioner is, by virtue of the provisions of Rule 2 of Schedule A of Act XI of 1852, final as regards the land and interests concerned in the decision. But once it has been decided finally by the Inam Commissioner that the Hebli estate is Saranjam, the title to and continuance of the estate must be determined, under Schedule B, Rule 10 of the Act, under such rules as Government may find it necessary to issue from time to time.

On the 17th of May 1898, Government passed rules for the regulation of the continuance and resumption of Saranjam estates, and those rules apply to the Hebli estate as well as to other Saranjams. In accordance with those rules, the estate was, upon the death of Pandurangrao, resumed by Government and re-granted, and as a result of the revision effected by the Secretary of State the share of Pandurangrao in the Hebli Saranjam has been re-granted to Vithalrao, the second defendant.

This, then, is a suit against Government relating to land held as Saranjam, and is therefore excluded from the jurisdiction of the Civil Courts by the provisions of sub-section (a) of section 4 of the Revenue Jurisdiction Act (X of 1876). The District Judge was therefore right in holding that he had not jurisdiction to entertain the suit.

It has been suggested that the plaintiff has acquired certain occupancy rights in the estate of which he cannot be deprived by any decision of Government under the Saranjam Rules. This is obviously an after-thought suggested by the decision of this Court in *Ganpatrav Trimbak v. Ganesh Baji Bhat*⁽¹⁾. It was a point which was not raised in the plaint but is mentioned in the memo of appeal for the first time. It is a question which, we think, ought not to be decided in this suit, and we, therefore, abstain from expressing any opinion upon it.

We confirm the decree of the District Judge dismissing the suit, and we dismiss this appeal with costs.

Decree confirmed.

G. B. R.

(1) (1885) 10 Bcm, 112.

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APPELLATE CIVIL.

Before Mr. Justice Chandavankar and Mr. Justice Heaton.

1908.
November 11.

JASODA WARD CHHOTU (ORIGINAL DEFENDANT), APPELLANT, *v*
CHHOTU MANNU DALVALU (ORIGINAL PLAINTIFF), RESPONDENT *

Restitution of conjugal rights—Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Bombay Civil Courts Act (XIV of 1869), section 24—Suits Valuation Act (VII of 1887), section 11.

A suit for restitution of conjugal rights, wherein the claim was valued by the plaintiff at Rs. 65, was instituted in the Court of the Second Class Subordinate Judge. The First Court decreed the claim, and on appeal the decree was confirmed. On second appeal it was contended that the First Court had no jurisdiction to try the suit.

Held, that the valuation of the claim by the plaintiff must be accepted for the purpose of jurisdiction, unless it was shown to have been made either from any improper motive or deliberately for the purpose of giving the Court a jurisdiction which in fact it had not.

Jan Mahomed Mandal v. Mashar Bibi(1), followed.

SECOND appeal from the decision of H. S. Phadnis, District Judge of Khandesh, confirming the decree passed by D. S. Sapre, Subordinate Judge of Jalgaon.

Suit for restitution of conjugal right.

The plaintiff filed his suit in the Court of the Second Class Subordinate Judge at Jalgaon, valuing his claim at Rs. 65. That Court decreed the claim.

On appeal, this decree was confirmed by the District Court.

The defendant preferred a second appeal to the High Court contending *inter alia* that the Second Class Subordinate Judge had no jurisdiction to try the suit which was for restitution for conjugal rights.

R. R. Desai for the appellant (defendant).—A Subordinate Judge of the Second Class has no jurisdiction to try a suit for restitution of conjugal rights. The claim is here valued for

* Second Appeal No. 877 of 1908.

(1) (1907) 34 Cal. 352.

purposes of court-fees at Rs. 65 ; but that does not determine jurisdiction.

Under section 24, clause (2), of the Bombay Civil Courts Act (XIV of 1869) the First Class Subordinate Judge has jurisdiction to try all suits of a civil nature within the territorial jurisdiction. Under the third clause of the section, the Second Class Subordinate Judge can try any suit wherein the subject-matter does not exceed in amount or value Rs. 5,000. Therefore, he can try only those suits which are capable of money valuation.

In the present case the subject-matter is incapable of any money valuation ; and the claim as valued by the plaintiff for court-fee purposes is no guide to determine jurisdiction. See *Aklemannessa Bibi v. Mahomed Hatem*⁽¹⁾.

The respondents did not appear.

CHANDAVARKAR, J. :—It is contended before us on the authority of *Aklemannessa Bibi v. Mahomed Hatem*⁽¹⁾ that the suit for restitution of conjugal rights, out of which this second appeal arises, did not lie in the Court of the Second Class Subordinate Judge, by whom it was tried, because, according to the Bombay Civil Courts Act, that Court has jurisdiction to try no suit other than that the subject-matter of which is of the value of less than Rs. 5,000, whereas a suit for restitution of conjugal rights (it is urged) is not one the subject-matter of which can be valued. What is meant by this argument is, as we understand it, that a suit for restitution of conjugal rights is not one the subject-matter of which can be precisely and definitely valued. In such cases the law leaves it to the plaintiff to put his own valuation on the plaint and accepts it for the purposes of jurisdiction unless it is vitiated by some improper motive such as a deliberate design to give the Court a jurisdiction which it has not. As was said in the case of *Lakshman Bhatkar v. Babaji Bhatkar*⁽²⁾, what *prima facie* determines the jurisdiction is the claim or subject-matter of the claim as estimated by the plaintiff, and “ this determination having given the jurisdiction, the jurisdiction itself continues... unless a different principle comes into operation to prevent such a result or to make the proceedings

(1) (1904) 31 Cal. 849.

(2) (1883) 8 Bom. 31.

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from the first abortive." This law has been followed in a series of cases in this Court: *The firm of Jechand Khushalchand v. The firm of Moti Laxji*⁽¹⁾, and *Gulabchand Motiram Gujar v. Fulchand Panachand*⁽²⁾. It has also been adopted by the other High Courts.

In the present case the plaintiff valued the subject-matter of the suit at Rs. 65 and nothing was urged against the valuation in either of the lower Courts. The point as to want of jurisdiction in the Second Class Subordinate Judge's Court is raised for the first time in second appeal. The case of *Aklemannessa Bibi v. Mahomed Hatem*⁽³⁾ cannot be accepted as a decision on the point because, as has been pointed out by the same Court in *Jan Mahomed Mandal v. Mashar Bibi*⁽⁴⁾, the observations in the former case are mere *obiter dicta*. In the latter case the Calcutta High Court has held that, where the claim in a suit for restitution of conjugal rights is valued by the plaintiff, that valuation must be accepted for the purpose of jurisdiction unless it is shown to have been made either from any improper motive or deliberately for the purpose of giving the Court a jurisdiction which it has not.

The decree must be confirmed.

Decree confirmed.

R. R.

(1) (1888) P. J. J.

(2) (1889) P. J. 192.

(3) (1904) 31 Cal. 849.

(4) (1907) 34 Cal. 352.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), APPELLANT, v. LALDAS NARANDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

1909.

November 30.

[Bombay Land Revenue Code (Bombay Act V of 1879), section 48—Government—Assessment on land—Land appropriated for agricultural purposes—Special user of land by stacking thereon timber in fair season—Construction of statute.

The plaintiff, who was the occupant of land used for agricultural purposes, paid to Government the assessment chargeable on "land appropriated" for those purposes under clause (a) of section 48 of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff had let it out for stacking timber and derived profit from this special user of the land. Government levied an additional assessment on the land on account of that special user, purporting to do so under section 48, clause (b), of the Code.

Held, that the lands could not be charged with any additional assessment in respect of the special user under section 48, clause (b), of the Code; for the expression "appropriated for any purpose" in the clause means set apart for that purpose to the exclusion of all other uses.

The Bombay Land Revenue Code (Bombay Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject.

APPEAL from the decision of F. X. DeSouza, District Judge of Thana.

Suit for declaration and injunction.

* First Appeal No. 29 of 1909.

† The Bombay Land Revenue Code (Bombay Act V of 1879), section 48, runs as follows:—

The land-revenue leviable under the provisions of this Act shall be chargeable—

- (a) upon land appropriated for purpose of agriculture,
- (b) upon land appropriated for any purpose from which any other profit or advantage than that ordinarily acquired by agriculture is derived,
- (c) upon land appropriated for building sites.

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The plaintiff Laldas owned certain lands which were used for agricultural purposes during the cultivating season, and for which he was paying to Government an annual agricultural assessment of Rs. 18-5-6. During the fair season, the lands were every year rented by the plaintiff to timber merchants for the purpose of stacking timber thereon.

The Collector of Thana, purporting to act under section 48 and Rule 56 of the Rules framed under the Bombay Land Revenue Code (Bombay Act V of 1879), levied altered assessment on the lands in view of their non-agricultural use during the fair season; and recovered Rs 501-15-8 for the years 1904—1907 from the plaintiff. The plaintiff paid the amount under protest.

Subsequently, the plaintiff filed this suit against the Secretary of State for India in Council praying for a declaration that the lands were not liable to altered assessment, for refund of the amount already paid by him, and for an injunction restraining the defendant from further levying additional assessment.

The District Judge decreed the plaintiff's claim by granting the declaration and injunction sought by him; and by awarding refund of Rs. 122-3-2. In the course of his judgment, the Judge remarked as follows:—

The crucial point in this case is whether it can be said that in the circumstances above described the plaintiff-lands have been appropriated to a purpose unconnected with agriculture within the meaning of section 48 (b) of the Land Revenue Code. The learned Government Pleader presses for an answer in the affirmative, contending that the section contains no such adverb as "perpetually" or "permanently" to qualify the word appropriated. He argues that the appropriation to non-agricultural uses may well be a temporary appropriation only during the fair season, and he urges that if an occupant derives an extra profit by temporarily appropriating land to a non-agricultural purpose, it is within the scheme of the Land Revenue Code that the Crown should participate in any such extra profit. He adverts to the rule of construction that statutes imposing burdens, like Penal Acts, are not to be so construed as to furnish a chance of escape and a means of evasion (Maxwell on the Interpretation of Statutes, 3rd edition, p. 405), and he asked the Court to apply that rule in the present case by giving effect to the interpretation for which he contends.

¹ Now, the maxim *ex antecedentibus et consequentibus fit optima interpretatio* furnishes a well-known rule of construction in the interpretation of statutes.

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And it has been laid down as a corollary of this maxim that 'if any section be intricate, obscure, or doubtful the proper mode of discovering its true meaning is by comparing it with the other section and finding out the sense of one clause by the words or obvious intent of a other' (Broom's Legal Maxims, 7th edition, p 434). Accordingly in order to determine whether a temporary diversion of the lands to non-agricultural purposes constitutes an 'appropriation' to such purposes within the meaning of section 48 (b), it is necessary to refer to the clause immediately following. That clause enacts as follows:—
"And the assessments fixed under the provisions of this Act upon any land appropriated for any one of the above purposes, shall, when such land is appropriated for any other of the said purposes, notwithstanding that the term for which such assessment was fixed, may not have expired, be liable to be altered and fixed at a different rate."

The Legislature then has classified lands for the purpose of the levy of assessment into three classes, according as they are appropriated to agricultural, non-agricultural or building purposes. This classification is obviously intended to be exhaustive; apparently it is also intended to be mutually exclusive, for it is provided that the diversion of land from one class to another entails liability to enhanced assessment under section 48 and to a fine under section 65. It was apparently not contemplated that the same land could, during the pendency of a survey settlement, be "appropriated" to agricultural as well as non-agricultural purposes during one and the same year so as to be referable to either class indiscriminately. The "appropriation" contemplated by the section seems thus to have been an exclusive and permanent appropriation so that lands assessed at the survey settlement as lands "appropriated for purposes of agriculture" would not be liable to re-assessment as lands "appropriated" for any purpose unconnected with agriculture unless they had in the interval ceased to be appropriated to agriculture. If this is the correct interpretation then it is obvious that it is not competent to the Collector to levy enhanced assessment on the plaint-lands which are admittedly "appropriated to agriculture" during the cultivating season.

The same result follows if we apply the general rule that the words of a statute are to be understood in their etymological or popular sense, unless there are special reasons to the contrary. To "appropriate" is defined in Webster's dictionary to mean "to set apart for or assign to a particular use to the exclusion of all others." Accordingly, so long as land is used for agricultural purposes "during the only period when it is capable of being so used," it cannot be subjected to enhanced assessment or fine as land appropriated to purposes unconnected with agriculture, because there has been no exclusion of agricultural uses but rather a combination of agricultural with non-agricultural uses.

The argument that the Crown is entitled to participate in any extra profit derived by the occupant from a temporary appropriation of agricultural land

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to a non-agricultural purpose can easily be answered by a reference to the definitions of the words "occupant", "holder" and "right to hold land" given in section 3 (16, 11, 10) respectively of the Land Revenue Code

An occupant's right to the possession and enjoyment or disposal of land is absolute subject only to the burdens and limitations imposed by the Land Revenue Code. Such burdens must be stated in clear terms in the Code itself and cannot be left to be inferred from extraneous considerations, for it is a recognised rule that statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction, they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt (Maxwell on the Interpretation of Statutes, 8th edition, p. 399)

The conclusion then at which I arrive is that the plaintiff lands cannot be said to have been appropriated by the plaintiff to a purpose unconnected with agriculture within the meaning of section 48 (b) of the Land Revenue Code and rule 56 of the rules framed thereunder and are hence not liable to altered assessment under that section.

The defendant appealed to the High Court.

Strangman (Advocate General), with the Government Pleader, for the appellant—The lower Court has erred in construing the term "appropriated" in clause (b) of section 48 of the Bombay Land Revenue Code (Bombay Act V of 1879). The wording of the section makes it clear that Government have the right to levy extra assessment when land used for agriculture in the agricultural season is utilized for non-agricultural purposes during the fair season. There is no hardship in this; for when the occupant makes extra profit, he must also be liable to extra assessment.

G. K. Parekh and *P. B. Shingne* for the respondent.—The Land Revenue Code should always be construed in favour of the subject. The lower Court's view is correct. There cannot be any appropriation within the meaning of section 48 of the Code, unless there is abandonment of one purpose and exclusive adoption of another. At any rate, the new purpose for which the land is used ought to be such that it becomes unalterably

attached to the soil and is not capable of abandonment easily as in the present case.

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CHANDAVARKAR, J.—The respondent is the occupant of land used for agricultural purposes and has been paying to Government assessment chargeable on “land appropriated” for those purposes under clause (a) of section 48 of the Bombay Land Revenue Code. During the seasons when the land is not used for agricultural purposes, the respondent has been letting it out for stacking timber and deriving profit from this special user of the land. Government by the suit which has led to this appeal claim the right to impose additional assessment on the land on account of that special user. They rely on clause (b) of section 48, which provides that land-revenue shall be chargeable “upon land appropriated for any purpose from which any other profit or advantage than that ordinarily acquired by agriculture is derived.” The word “appropriated” means in its natural sense “made one’s own” and conveys the idea of exclusion. “To appropriate” anything for any purpose is to set it apart for that purpose in exclusion of all other uses; American and English Encyclopædia of Law; *Whitehead v. Gibbons*⁽¹⁾.

The context in which the clause in question occurs in section 48 leads to the same conclusion. Clause (a) relates to “land appropriated for purpose of agriculture.” That obviously means land devoted to agricultural purposes and no other. Similarly clause (c) relates to “land appropriated for building sites”—that is, land devoted to building purposes and no other. If the word “appropriated” has that meaning in clauses (a) and (c), we must understand it in the same sense in clause (b) having regard to the ordinary canon of construction that a word, which occurs more than once in an Act, must be construed to have the same meaning throughout the Act unless some definition in it or the context shows that the Legislature used the word in different senses.

⁽¹⁾ 10 N. J. Eq 235.

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Had the Legislature intended clause (b) to apply to land used both for agricultural and other purposes, it would have used apt language to convey its meaning. It would have referred to the land in clause (b) as land appropriated for purposes of agriculture and other purposes except building sites. This is a taxing enactment, and must be construed strictly in favour of the subject.

The decree appealed from must, therefore, be confirmed with costs.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Bachelor and Mr. Justice Chaulal.

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June 15.

BAYABAI, WIDOW, AND OTHERS, APPELLANTS AND DEFENDANTS 2, 3, 4, v.
HAJI NOOR MAHOMED CASSAM, RESPONDENT AND PLAINTIFF, AND
N. C. MACLEOD, RESPONDENT AND 1ST DEFENDANT.*

Practice—Suit against defendant on ground which failed not to be decreed on another ground—Application for leave to amend plaint after arguments heard in appeal disallowed—Res judicata.

A suit brought against the defendants on one ground which fails should not be decreed against them on another ground which they had no opportunity of meeting.

After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character.

H. filed a suit in 1904 against A. and J. the drawer and indorser respectively of two hundies. At the time of filing the suit J. was dead.

H. obtained a decree against both defendants, which decree remained unsatisfied.

In 1905 H. filed a suit against the heirs of J. on the same two hundies.

Held, the earlier suit having been filed against the firm of J. and not against J. personally was a bar to the later suit.

THIS was a suit filed by Haji Noor Mahomed Cassam against the defendants as the heirs and legal representatives of one

* Appeal No. 1477, Suit No. 611 of 1905.

Jusub Abba, deceased, for the recovery of a sum of Rs. 1,800 with interest alleged to be due to the plaintiff upon certain hundies, dated the 5th and 8th days of September 1904, passed by one Abdoor Rehman Noor Mahomed and endorsed by the first defendant in the name of his deceased father Jusub Abba. The defendants 2, 3, 4 pleaded that the suit was barred as being *res judicata*, the plaintiff having sued to judgment these parties in another suit. Russell, J., passed a decree in favour of the plaintiff for the amount claimed with costs. Against this decree the defendants 2, 3, 4 appealed.

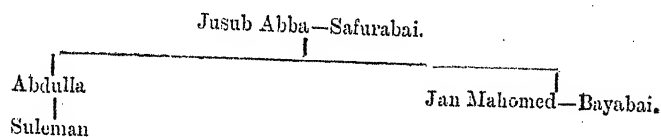
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Robertson (with *Davar*) for the appellants.

Setalvad (with *Mirza*) for the respondents.

BATCHELOR, J.:—The following tree shows the relation between the various defendants-appellants:—



Abdulla is an insolvent, and the Official Assignee is the first defendant in his place. Jan Mahomed died intestate in 1906, leaving his widow his only heir. The parties are Cutchi Memons, and the plaintiff is by profession a money-lender.

The suit out of which this appeal arises is based on two *hundies* drawn by one Abdul Rehman in September 1904 in favour of Jusub Abba, and endorsed in the name of Jusub Abba by Abdulla to the plaintiff. Upon these same *hundies* the plaintiff brought an earlier Suit No. 863 of 1904 against Abdul Rehman, the drawer, and Jusub Abba, the indorser, and in that suit obtained a decree against both the then defendants. That decree has remained unsatisfied, and it is common ground that Jusub Abba died in February 1902 or over two years before the institution of this Suit No. 863. The suit underlying the present appeal is No. 611 of 1905, and in it the plaintiff seeks to enforce liability for the two *hundies* against the defendants as the representatives of the deceased Jusub Abba. The learned Judge below has decreed the claim, and against that decree

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the present appeal is preferred by the defendants Bayabai, Safurabai and Suleman.

The stress of the argument in this appeal has fallen upon the question as to the exact character of Suit No. 863, and Mr. Robertson has contended that that suit is a bar to the present claim. The contention is put in the alternative, and it is urged that the second defendant in Suit No. 863 was either the firm of Jusub Abba or was the individual Abdulla Jusub: in either of these cases it is said that the present claim is unsustainable. I will deal with the argument that the second defendant in the earlier suit was the firm of Jusub Abba, and not the individual of that name. It will not be necessary to consider the alternative suggestion. Turning, first, to the title of the suit, we find that the second defendant is there described as "Jusub Abba also of Bombay Mahomedan inhabitant doing business at Esplanade Road opposite to Watson's Hotel within the fort." I must accept the argument that that is *prima facie* the description of an individual person, but I cannot accept the view that that is an end of the matter. For, having regard to the practice of these Courts, the description is conceivably applicable to the firm Jusub Abba, and I think we must look to the evidence to see what precisely the description meant. We need not look beyond the evidence of the plaintiff himself. In the course of execution proceedings under the earlier decree, notice was issued on Safurabai, who on 16th June 1905 made the affidavit exhibit 21 pointing out that Jusub Abba had died more than two years before the suit was filed. Plaintiff's reply is his affidavit exhibit 1 of 12th January 1906, in which he not merely admits, but emphatically contends, that his suit of 1904 was brought against the firm of Jusub Abba, which through its manager, Abdulla Jusul, had endorsed the *hundies* to him. In his deposition in the present suit the plaintiff does indeed make a half hearted attempt to resile from this position, but on his attention being drawn to his affidavit he abandons the attempt and says, "I say now I sued the firm of Jusub Abba. By firm I mean shop. I sued the owner of the shop." There the matter rests, except that this view is amply corroborated by the form in which the *hundies* are drawn and by the general

tenour of the plaintiff's deposition. For it appears that the plaintiff had no knowledge of the man Jusub Abba; he never saw him, he says, or tried to see him. Asked how he knew the name of Jusub Abba, he says "I know the name of Jusub Abba in connection with this business. Jusub Abba was the name of the firm—the firm of Jusub Abba, his own business." And further on he says that what he thought he was getting by the suit was a decree against the firm. And here, I think, may be found the answer to the question put by the plaintiff's counsel in the lower Court, namely, why should the plaintiff have brought a suit against a dead man? It may be that the plaintiff when he filed the suit was not aware of Jusub's death, though his own evidence on the subject is plainly untrustworthy; but the real explanation is, I conceive, that it mattered nothing to the plaintiff whether the man Jusub Abba was alive or dead; his suit was a suit against the firm. So the writ was served on Abdulla as manager of the firm—see section 74, Civil Procedure Code—and that is the position assigned to Abdulla throughout the proceedings. No doubt the question is not, whom did the plaintiff intend to sue, but whom did he in fact sue? The distinction, however, cannot, in my opinion, avail the plaintiff here; for under the practice and rules of this Court—see especially Rule 375 of the High Court Rules—a suit framed within the meaning and in the form of Suit No. 863 would be a good suit against the firm. In other words the plaintiff in the earlier suit did intend to sue the firm of Jusub Abba and did give sufficient effect to that intention. In the same way the plaintiff filed Suit No. 16788 of 1904 on the Small Cause Court against "Jusub Abba" (exhibit B), and, as he admits, under the decree made, he levied an attachment on the shop and the money was paid.

Thus upon a consideration of all the evidence and the circumstances connected with Suit No. 863 I come to the conclusion that that suit was brought against the firm of Jusub Abba. That being so, the present suit admittedly will not lie against the defendant-appellants as partners, and it is in that view of their position that the learned Judge has decreed against them, and upon that footing only has the plaintiff sought to uphold the decree.

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Upon this finding the question arises why the plaintiff did not rest content with the decree which he obtained and which as he understood it bound the firm, especially as there has been no determination in execution proceedings or otherwise that the decree does not bind the firm. Mr. Robertson's answer to this question is that the plaintiff, having discovered that the assets of the firm of Jusub Abba are exhausted, is now anxious to come upon certain immoveable properties which would not be liable under the terms of the decree in Suit No. 863 construed as a decree against the firm. It seems to me that this is the real explanation of the origin of the present suit, and upon this point reference may be made to the plaintiff's application exhibit 2 of 5th May 1905. That was the first step taken in execution of the decree, and the disingenuous passage in paragraph 2 of the application as to the second defendant being "now" dead is very significant. I have no doubt that the plaintiff had long been aware that Jusub Abba's death had occurred long before the decree, and when he was challenged upon this point by Safurabai in her affidavit of 16th June 1905, he falls back upon the other position that the second defendant in his suit was the firm of Jusub Abba: see his affidavit exhibit 1. Finally on 20th January 1906 he abandons the notice against Safurabai (exhibit A 20), the present suit having been instituted on 11th August 1905. It is not, as Mr. Setalvad has suggested, that the plaintiff was forced by Safurabai's contentions to abandon execution: it was his business to go on with it and obtain the adjudication of the Court, and I cannot doubt that that is the course which he would have pursued if he had thought that his decree was sufficient for his purposes. But for reasons which are no longer obscure he elected to give the go-by to the decree which he had, and endeavoured to convert that decree into one of a different character. There can be no doubt of the nature of the suit he then filed. The only prayer in the plaint—other than the formal prayer for further and other relief—is a prayer "that the defendants as the representatives of the deceased Jusub Abba" may be decreed liable to discharge the debt out of the estate of Jusub Abba. Before us it was conceded that no liability could be attached to the defendant-appellants

upon this footing, and indeed it is plain that as representatives of Jusub Abba they cannot be held responsible for a debt contracted two years after Jusub Abba's death. The learned Judge below was, I gather, of the same opinion, and he has decreed against the appellants, not as representatives of Jusub Abba, but as partners, or rather as *quasi*-partners, in a firm. But they were not sued in this latter capacity, and no question of their liability in that capacity is raised either in the pleadings or in the issues on which the parties went to trial. In my opinion, therefore, the appellants upon this ground alone are entitled to succeed, and to claim that a suit brought against them on one ground, which failed, should not be decreed against them on another ground which they had no opportunity of meeting. The only plain issue as to the appellant's liability is issue No. 13 which contemplates merely their liability as representatives of Jusub Abba, and Mr. Robertson, who appeared for the appellants below, was taken by surprise when the ground assigned for the liability was shifted as the trial proceeded; and no attempt was made to obtain the Judge's permission to amend the plaint or frame further issues.

In my opinion, then, the appeal must be allowed both because the suit against the appellants was barred by Suit No. 863 of 1904, and, because it was not competent to the Court in this suit to make a decree against the appellants on the footing of their being partners or *quasi*-partners in the firm.

After the arguments in this appeal had been completely heard Mr. Setalvad applied for leave, if necessary, to amend the plaint; but it is plain that at that stage we ought not to allow a suit of one character to be converted into a suit of a substantially different character.

The judgment of the lower Court must be reversed and the suit must be dismissed as against the appellants with costs throughout.

CHAUBAL, J.—I concur.

Decree reversed.

Attorneys for appellants.—*Messrs. Unralla and Phirozshaw.*

Attorneys for respondents.—*Messrs. Mirza and Mirza.*

B. N. L.

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HAJI NOOR
MAHOMED.

ORIGINAL CIVIL.

Before Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor.

1909. THE FIRM OF GUNNAJI BHAWAJI, APPELLANTS AND PLAINTIFFS, v.
March 2. MAKANJI KHOOSALCHAND AND OTHERS, RESPONDENTS AND DEFENDANTS.*

Civil Procedure Code (Act XIV of 1882)—Amendment of plaint by referring to document not included in list of documents relied on.

At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application.

On appeal —

Held, that the amendment should have been allowed.

APPEAL from the judgment of Russell, J., dated 21st August 1908.

The plaintiffs filed this suit on 15th October 1907 against the defendants who were partners to recover a sum of Rs. 6,671 due to the plaintiffs on agency accounts and interest thereon. The plaint stated that the accounts were adjusted and settled on the 18th September 1899 when a sum of Rs. 8,501 was found payable to the plaintiffs by the defendants for which sum the defendants signed an acknowledgment undertaking to repay it with interest at 6 per cent. At the hearing of the suit when it came on as a short cause a written statement was put in raising several defences, but the only one relied on was that of limitation; and upon that being done counsel for the plaintiff applied for leave to amend the plaint, because he sought to rely upon another document, namely, a letter of 20th of March 1902, which amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. Russell, J., declined to allow the amendment on the ground that the letter was not referred to in the list of documents relied on by the plaintiffs and dismissed the suit with costs. Against this decision the plaintiffs appealed.

* Appeal No. 48 of 1908.

Setalvad for the appellants:—The amendment should have been allowed. The suit is brought under the Code of 1882. We submit that if the suit was barred on the face of it as the lower Court thinks it is the plaint ought under section 54 (a) to have been rejected at the time of presentation and not taken on the file. Had this been done the plaintiffs might have filed another suit while there was yet time, whereas now owing to the period that has passed between the date of admission of the plaint and now they would be hopelessly out of time. Section 54 does not apply to the case but section 53 and the Court ought to have given leave to amend the plaint. The object of a suit being to get at the rights of parties any amendment which may be required for that purpose should subject to general principles be allowed, see Bowen L. J. in *Clopper v. Smith*⁽¹⁾. In *Mohummud Zahoor v. Mussumat Thakooranee*⁽²⁾ the Privy Council allowed an amendment on the ground that if the plaintiff was left to bring a fresh suit it might be met by a plea of limitation. By allowing the amendment the character of the suit would not be altered. The cause of action would have remained the same; the defendant could still have pleaded the same defence of limitation, all the amendment could do would have been to give the plaintiff greater facility to meet the defences.

Strangman, Advocate General, and *Inamratty* for the respondents.

The lower Court was right in disallowing the amendment. A gross injustice would be done to the defendants by allowing it. See *Steward v. North Metropolitan Tramways Company*⁽³⁾; *Weldon v. Neal*⁽⁴⁾, *Clarapade & Co. v. Commercial Union Association*⁽⁵⁾.

SCOTT, C. J.:—In this case we cannot agree with the learned Judge of the Court below that an amendment such as was asked for would convert the suit into a suit of different and inconsistent character. The suit would remain the same based upon exactly the same cause of action except for the addition of one

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(1) (1884) 26 Ch. D. 700 at p. 711.

(3) (1886) 16 Q. B. D. 556.

(2) (1867) 11 Mco. I. A. 468.

(4) (1887) 19 Q. B. D. 394.

(5) (1883) 32 W. R. (Eng.) 262.

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allegation. We think, therefore, that the amendment should be allowed as shown in paragraph 1 of the memorandum of appeal, but as the controversy has arisen entirely through the negligence of the plaintiffs we direct that they must pay the costs of the appeal and of the first hearing in the Court below including the costs, if any, of the hearing of the judgment. Leave granted to defendants to file a supplemental written statement, if so advised.

Attorneys for the appellants:—*Messrs. Mehta and Dalpatram.*

Attorneys for the respondents:—*Mr. N. M. Cama.*

B. N. L.

APPELLATE CRIMINAL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

1909.

August 4.

MUNICIPAL COMMISSIONER OF BOMBAY, COMPLAINANT, v.
THE AGENT, G. I. P. RAILWAY COMPANY, ACCUSED.*

Indian Railways Act (IX of 1890), sec. 7—City of Bombay Municipal Act (Bom. Act III of 1888), sec. 5A—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary.

The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the Criminal Procedure Code (Act V of 1898):—

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Held, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and

* Criminal Reference No. 67 of 1909.

using the Railway notwithstanding anything in any other enactment for the time being in force.

The storing of timber was necessary for the convenient making, &c., of the Railway line.

Under section 7, sub-section 2 of the Indian Railways Act (IX of 1890) the Governor General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub-section 1.

REFERENCE by A. H. S. Aston, Chief Presidency Magistrate of Bombay, under section 432 of the Criminal Procedure Code (Act V of 1898).

The accused, the Agent of G. I. P. Railway Company, was charged under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having on or about the 25th March 1909 used certain premises, namely, two plots of ground, the property of the G. I. P. Railway Company at Bombay, for the purpose of storing timber without a license granted by the Municipal Commissioner of Bombay.

The timber in question consisted of about 15,000 Railway sleepers and it was admitted that no license was obtained and that the sleepers were timber and they were stored. The accused, however, contended on the strength of the ruling in *Emperor v. Wallace Flour Mill Company*⁽¹⁾ that as the Railway Company was not trading in timber and as the purpose for which the premises were used was entirely accessory and necessary for their business, the real purpose was not in fact to store.

The evidence recorded by the Magistrate also showed that the G. I. P. Railway Company for some years past had "stacked" sleepers on the said premises for the use of their whole line. The maximum of the sleepers stacked was estimated at about 36,000 sleepers and the minimum at about 7,000 and 8,000.

Under these circumstances the Chief Presidency Magistrate referred the following questions to the High Court for an authoritative decision under section 432 of the Criminal Procedure Code (Act V of 1898):—

(1) (1904) 29 Bom. 123.

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1. Does the fact that the Railway are not trading in timber and that the purpose for which the premises are used is necessary for the convenient carrying on of their business as a Railway over their whole system negative the intention to store within the meaning of section 394 (1) (d) of the City of Bombay Municipal Act?

2. Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?

3. Is the fee payable for a license contemplated by section 394 (1) (d) of the Municipal Act a tax within the meaning of section 135 of the Indian Railways Act IX of 1890?

4. Is the Government of India Notification No. 9977, dated the 29th November 1907, a valid notification within the meaning of section 135 (1) of the Indian Railways Act and does it render the Railway Company liable to pay the license fee in question?

5. Can an obligation to obtain a license be separated from a liability to pay the fee?

6. Do license fees come within the Notification?

In making the reference the Magistrate observed as follows:—

In this connection it may be pointed out that the Railway system worked by the G. I. P. Railway is about 2,900 miles in extent and sleepers were stacked for the use of the whole system. Mr. Bitty, J., in *Emperor v. Wallace Flour Mill Company*⁽¹⁾ laid down the principle that an intention to store is negatived if the quantity retained is only reasonably sufficient for the varying exigencies of consumption but it does not, I think, follow that the intention would be negatived if a Company having mills in various parts of India were to accumulate in one place a quantity sufficient for the varying exigencies of consumption of all its mills. In the case of *Emperor v. Wallace Flour Mill Company*⁽¹⁾, the supply of oil in hand would only have sufficed for about twelve days' use in the particular mill, in the present case the 15,000 sleepers which were stacked by the Railway would have sufficed according to the consumption in 1908 for about five months' use over the whole area worked by the Railway and according to the same rate the quantity of sleepers actually received and stacked in 1908 would have sufficed for nearly two years' use. It is true that the average for 1907 and 1908 together works out at a somewhat higher rate of consumption, viz., 39,739, but this is counterbalanced by the fact that on the 1st January 1908 there was a balance in hand of about 8,000 sleepers.

⁽¹⁾ (1904) 29 Bom. 193.

It is however contended by Mr. Yorke Smith that the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1893) preclude the Municipal Commissioner from insisting on a license.

Under section 7 clause (f) statutory powers have been conferred on the Railway to "do all other acts necessary for making, maintaining, altering or repairing and using the railway," and in my opinion on the evidence it is necessary for the convenient making, maintaining, altering or repairing the railway, that the Railway Company should be at liberty to store Railway sleepers on the premises in question from time to time. As the sleepers are obtained by shiploads from Australia, it inevitably follows that at certain periods there is a large accession to the stock.

Mr. Crawford however contends that even if the need for storing is conceded the obligation to obtain a license from the Commissioner is not thereby extinguished.

The Railway have a right to store subject to the necessity of obtaining a license. But the necessity of obtaining a license restricts to that extent the statutory power conferred by the Railway Act and implies a power in the Municipal Commissioner of refusing to grant a license and I am of opinion on reading the authorities relied on by the defence, viz, *London and Brighton Railway Company v. Truman*⁽¹⁾; *City and South London Railway Company v. London County Council*⁽²⁾; *London County Council v. School Board for London*⁽³⁾; *Emsley v. North Eastern Railway Company*⁽⁴⁾, that such a power is inconsistent with the statutory powers given to the Railway.

I think Mr Yorke Smith is also right in his contention that a license fee is a tax within the meaning of section 135 of the Railway Act and that the Notification by the Government of India, Department of Commerce and Industry, No. 9977, dated 29th November 1907, which is relied on as rendering the Railway administration liable to pay the tax, is not such a notification as was intended by the section and inoperative. The case of the *Brewers and Maltsters Association of Ontario v. Attorney General for Ontario*⁽⁵⁾ and section 3 (p) of the City of Bombay Municipal Act, 1888, have been cited with reference to the first contention while with reference to the second contention the validity of the Notification has been attacked firstly on the ground that its wording shows that the discretion necessary in framing a Notification under the section has not been exercised; *The Queen v. Bommaya*⁽⁶⁾, *Macbeth v. Ashley*⁽⁷⁾, *Sharp v. Wakefield*⁽⁸⁾, *Sprigg v. Sigcau*⁽⁹⁾; Maxwell on Interpretation of Statutes (third edition, pp. 175 to 177) and secondly on the ground that the Notification is not consistent with the Act under which it purports to have been made; *Macbeth v. Ashley*⁽⁷⁾ and *Rajam Chetti v. Seshayya*⁽¹⁰⁾. If the wording of the Notification is considered, I think it can

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(1) (1885) 11 App. Cas. 45.

(2) [1891] 2 Q. B. 513.

(3) [1892] 2 Q. B. 606.

(4) [1896] 1 Ch. 418.

(5) [1897] A. C. 231.

(6) (1882) 5 Mad. 26.

(7) (1874) L. R. 2 S. & D. 352—357.

(8) [1891] A. C. 173—179.

(9) [1897] A. C. 238.

(10) (1895) 13 Mad. 236 at p. 245.

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be reasonably contended that the Notification is so worded as to affect not only existing but even future railway administrations, not only existing but also future taxes and that its effect is virtually to repeal the provisions of the section from which it derives its authority."

The reference was heard by Scott, C. J., and Batchelor, J.

Cohen (instructed by *Crawford, Brown and Co.*) for the Municipal Commissioner.

Robertson (instructed by *Little & Co.*) for the Railway Company.

SCOTT, C. J.—The Agent of the G. I. P. Railway Company was charged in the Presidency Magistrate's Court under section 394 (1) (d) of the City of Bombay Municipal Act with having used certain premises for the purpose of storing timber without a license granted by the Municipal Commissioner.

The Chief Presidency Magistrate having taken evidence has referred for the opinion of this Court certain questions specified at the end of the case stated by him.

The first question is, in our opinion, one of fact and not of law, and, therefore, cannot be stated under section 432 of the Criminal Procedure Code, under which this reference is made.

As regards the other questions, if the second question is answered in the affirmative no answer need be given to the remaining questions, for the case will in that event have to be decided in favour of the respondent.

The second question is in these terms :

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Section 7 of the Indian Railways Act IX of 1890, to the provisions of which the G. I. P. Railway is subject, provides as follows :—

(1) "Subject to the provisions of this Act and, in the case of immoveable property not belonging to the Railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for companies, and subject also, in the case

of a Railway company, to the provisions of any contract between the company and the Government, a Railway administration may for the purpose of constructing a Railway or the accommodation or other works connected therewith and notwithstanding anything in any other enactment for the time being in force . . .

"(f) do all other acts necessary for making, maintaining, altering or repairing and using the Railway.

(2) "The exercise of the powers conferred on a Railway administration by sub-section (1) shall be subject to the control of the Governor General in Council."

In stating the case the Magistrate finds as a fact on the evidence that it is necessary for the convenient making, maintaining, altering or repairing the Railway that the Railway Company should be at liberty to store Railway sleepers on the premises in question from time to time and that as the sleepers are obtained by ship-loads from Australia it inevitably follows that at certain periods there is a large accession to the stock. Upon this finding it would appear *prima facie* that the Railway administration is authorised to store Railway sleepers upon the premises in question notwithstanding anything in any other enactment for the time being in force.

It is, however, argued on behalf of the Municipal Commissioner that notwithstanding the statutory authority and notwithstanding the finding of the Magistrate it is still necessary for the Railway Company to obtain a license under section 394 of the Bombay Act III of 1888 for storing sleepers upon the premises.

It will be convenient at this point to set out the portions of the sections of the Municipal Act, which have been referred to in argument :—

Section 394 (1), (b) and (d) provide :—

(1) "No person shall use any premises for any of the purposes hereinbelow mentioned, without, or otherwise than in conformity with the terms of, a license granted by the Commissioner in this behalf, namely . . .

(b) any purpose which is, in the opinion of the Commissioner, dangerous to life, health or property, or likely to create a nuisance, . . .

(d) storing for other than domestic use or selling timber, firewood, charcoal, coal, coke, ashes, hay, grass, straw or any other combustible thing."

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Section 479 (1) provides:—

(d) "Whenever it is provided in this Act that a license or a written permission may be given for any purpose, such license or written permission shall specify the period for which, and the restrictions and conditions subject to which, the same is granted, and shall be given under the signature of the Commissioner or of a municipal officer empowered under section 68 to grant the same."

Section 479 (3) provides:—

"Subject to the provisions of clause (d) of section 408, any license or written permission granted under this Act may at any time be suspended or revoked by the Commissioner, if any of its restrictions or conditions is infringed or evaded by the person to whom the same has been granted, or if the said person is convicted of an infringement of any of the provisions of this Act or of any regulation or by-law made hereunder in any matter to which such license or permission relates."

It is not disputed that the unrestricted provisions of section 394 would empower the Commissioner to refuse in his discretion to grant a license. This view has the authority of a ruling of this Court in its favour: see *Haji Esmail v. Municipal Commissioner of Bombay* ⁽¹⁾.

It was at first contended by counsel for the Commissioner that the power of refusal extended to such a case as the present but being pressed by the words of section 7 of the Railways Act "notwithstanding anything in any other enactment for the time being in force" and by the consideration that such a contention if upheld would give to the Commissioner, under section 394 (b), the power, if he thought fit, to prohibit the working of the Railway in parts of the city, he modified and reduced the argument to this, that although by reason of the terms of section 7 of the Railways Act the Commissioner could not prohibit the use of any premises, the use of which was authorised by the terms of section 7, yet he still had reserved to him under section 394 (1) (d) a power of regulating the method in which the Railway Company should store timber upon its premises even though such storing was authorised by section 7 (1) (f); and authorities were cited to the Court in support of the general proposition that an implied repeal of one Act by a later Act will not be

(1) (1903) 28 Bom. 253 : 5 Bom. L. R. 1001.

inferred if it is possible even partially to harmonise the provisions of the two Acts. While we recognise this as a general rule of construction, we do not think that there is any scope for its application in the present case; in the first place, it would involve an almost complete rewriting of section 394, part of it being left to stand, another part being restricted without any precise guidance as to the limits of the restriction and yet another part being altogether deleted. It seems to us very doubtful whether such a recasting of the section would be warranted by any recognised principles of construction. In the second place we have not only the provision that the words of section 7 shall be read notwithstanding anything in any other enactment for the time being in force, but we have an express declaration in sub-section (2) of the authority which shall have control of the Railway administration in the exercise of its powers under sub-section (1). That authority is the Governor General in Council and not the Municipal Commissioner.

The provisions of the Railways Act to which we have referred provide, we think, for an undivided and exclusive control of Railway administrations by the Supreme Government.

Considerations of convenience and the safety of the public and security of property have been pressed upon us in argument. But we do not think there is any practical force in any of these suggestions, for, if the Municipal Commissioner is really of opinion that the Railway Company is exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it is always open to him to make a representation to that effect to the Governor General in Council in order that the state of affairs complained of may be inquired into and if necessary remedied by the proper authority.

For these reasons we answer the second question in the affirmative and we return the case to the Presidency Magistrate to be disposed of in accordance with this finding.

Order accordingly.

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Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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September 7.

MUGAPPA CHANBASAPPA SAWADATII (ORIGINAL PLAINTIFF),
APPELLANT, v. MAHAMADS.AHEB TALAD IMAMSAHEB (ORIGINAL
DEFENDANT), RESPONDENT.*

Decree—Execution of decree—Decree for rent—Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagor overpaid himself from rents and profits—Mortgagor's right to execute decree for rent.

In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagor) became entitled to recover a certain sum from the defendant (mortgagee). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed, on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal :—

Held, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose— that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set-off.

SECOND appeal from the decision of T. D. Fry, District Judge of Dhárwár, confirming the order passed by G. N. Kelkar, Joint Subordinate Judge at Dhárwár.

Proceedings in execution.

The defendant mortgaged certain land with the plaintiff on the 25th September 1892 with possession. On the same day, the defendant passed a rent-note in respect of the land in favour of the plaintiff and the defendant entered on the land as plaintiff's tenant.

In 1904, the plaintiff sued the defendant on the rent-note to recover from him four years' rent (1899 to 1903), and obtained

* Second Appeal No. 472 of 1908.

a decree for Rs. 1,378-4-1. At the date of the decree, the provisions of the Dekkhan Agriculturists' Relief Act did not apply.

The provisions of the Dekkhan Agriculturists' Relief Act were made applicable to the district in 1905.

The defendant sued in 1906 for redemption of the mortgage. In the course of the suit accounts were taken of the dealings in the way provided for by the Act, and they showed that not only had the mortgage been satisfied by February 1898 but that the mortgagee had received over Rs. 900 in excess.

The plaintiff then applied to execute the decree for rent.

The Subordinate Judge rejected the application on the following grounds :—

"The original mortgage-debt has been more than satisfied by the usufruct of the mortgaged lands, and the mortgagee has already received nearly Rs. 950 in excess of what was due to him under the mortgage. This complete satisfaction of the mortgage-debt took place before April 1898. This decree is for the four years' rent subsequent to April 1898. The account taken in Suit No. 114 of 1906 shows that after February 1898 nothing was due to the mortgagee under his mortgage, and that since then he has enjoyed the profits for nothing. Under these circumstances, I think the decree-holder cannot be allowed to execute this decree. If the Court allowed him to execute this decree, it would be helping him to get money to which he is not entitled after the complete satisfaction and discharge of the mortgage-debt. This would be going against the spirit of the Dekkhan Agriculturists' Relief Act. There is no question of going behind the Court's decree or of disturbing any jural relations. The question is "whether the Court can lend its assistance to one seeking to make an undue gain and to cause undue loss to another" ? I think the Court cannot do this.

This decree was confirmed by the District Judge.

The plaintiff appealed to the High Court.

Jayakar, with *K. H. Kelkar*, for the appellant.—The lower Court has misconceived the question; it is whether the first decree, being a subsisting decree, is capable of execution or not. The question that at the date of that decree, *viz.*, 8th July 1905, Rs. 1,378-4-1 were due is *res judicata* in the execution proceedings, the defendants are estopped from questioning this finding in execution proceedings. The execution proceedings are only a carrying out of the decree and the only question which

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the Court can go into in execution proceedings is the question of the satisfaction of the decree under section 258, old Civil Procedure Code, and Order 21, rule 2, new Civil Procedure Code. But the Court has not proceeded under this section, since this is not a case of subsequent payment or satisfaction of the decree. Here the defendants want to counteract the finding in the first decree that Rs. 1,378-4-1, was due, by pleading against it, in execution proceedings, the finding in the redemption suit that nothing was due from defendant at the date of the first decree and that the defendants had paid Rs. 950 more than was due. This cannot be allowed to be done in execution proceedings.

We say this case has nothing to do with the Dekkhan Agriculturists' Relief Act, since the first decree was passed before the introduction of that Act. The Act cannot be construed retrospectively: see *Fatmabibi v. Ganesh*⁽¹⁾. The amount of Rs. 950, found as overpaid, is arrived at by taking accounts on the footing of the Dekkhan Agriculturists' Relief Act.

But assuming that the Dekkhan Agriculturists' Relief Act applied, there is nothing in that Act enabling the Courts to depart from the ordinary rule of practice that the Court executing the decree has no power to vary the decree: see *Ramchandra v. Kondaji*⁽²⁾ and the cases cited there. The sections of the Act which are most favourable to such a case are sections 12 and 13 but even these sections, it has been held, cannot apply to decrees passed previously: see *Goverdhan v. Yesu bin Anaji* and *Apaji v. Almaram*⁽³⁾; *Tatya Vithoji v. Bapu Balaji*⁽⁴⁾; *Narlu v. Raghu*⁽⁵⁾.

As for the second part of the finding in the redemption suit that Rs. 950 were over-paid, I submit, assuming that the Dekkhan Agriculturists' Relief Act governed this case, there is nothing in the Act to allow defendants to claim a set-off of an amount found as owing to them at the foot of an account taken on the basis provided by the Act. The Act being a special piece of legislation passed for a particular object cannot be so construed

⁽¹⁾ (1907) 31 Bom. 630.

⁽³⁾ P. J. for 1882, p. 125.

⁽²⁾ (1896) 22 Bom. 221 at p. 224.

⁽⁴⁾ (1883) 7 Bom. 330.

⁽⁵⁾ (1884) 8 Bom. 303 at p. 305.

as to cover purposes which were never contemplated: see *e.g.*, *Janoji v. Janoji*⁽¹⁾ where even a refund was disallowed.

The first decree was never mentioned or referred to in the redemption litigation in 1906: see *e.g.*, the plaint in that suit. It was not taken into account in the latter suit, the question of the first decree was expressly left open in the redemption judgment: see the judgment.

D. A. Khare for the respondent.—The first decree has been paid off. That is the finding in the second decree, which must be accepted, though the Court has not made an actual order for payment of the amount found to be over-paid. The Court could not make such an order in that suit.

The defendant could have brought a suit to recover the amount over-paid under the Dekkhan Agriculturists' Relief Act: see *Williams v. Davics*⁽²⁾. If undue influence, or wrong advantage or any other equitable defence is proved, the Court sets aside the transaction. I ask the Court to act on the same principles here: see *Janoji v. Janoji*⁽³⁾; *Sheo Saran Singh v. Mohalir Pershad Shah*⁽⁴⁾; *Ramchandra Bala Sathe v. Jonardan Apaji*⁽⁵⁾.

CHANDAVARKAR, J.:—We must set aside the decree of the lower Court and allow the execution in this matter to proceed. The decree for rent, it is admitted, remains unexecuted. But what is relied upon for the respondent is that, according to a subsequent decree for redemption, a certain amount over and above that due to him as mortgagee was appropriated by the appellant, during the time that he was in possession of the property as mortgagee. That amount is adjudged to have been so appropriated upon account taken under the Dekkhan Agriculturists' Relief Act. It is conceded that the Act did not apply at the time the decree for rent was obtained. That decree gave a right to the appellant to recover a certain amount from the respondent. The fact that in a subsequent decree passed under the Dekkhan Agriculturists' Relief Act, it was found upon taking accounts in the way directed by the Act that the appellant as

(1) (1882) 7 Bom 185.

(3) (1882) 7 Bom.185.

(2) (1829) 2 Sim. 461.

(4) (1905) 32 Cal.576.

(5) (1889) 14 Bom.19.

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mortgagee had over-paid himself from the rents and profits cannot affect the right he had acquired under the previous decree which stands in all its force. The Dekkhan Agriculturists' Relief Act nowhere provides that where, upon an account taken under it, it is found that a mortgagee in receipt of rents and profits has overpaid himself, the overpaid amount becomes a debt due from him to the mortgagor and that the latter becomes entitled to recover it from the mortgagee. As was held in *Ramchandra Baba Sathe v. Janardan Ipaji*⁽¹⁾, a mortgagor under such circumstances is only enabled by the Act to redeem his mortgaged property on favourable terms upon an account taken in the special mode directed by the Act; but the Act does not entitle the mortgagor to claim the payment from the mortgagee of any amount received from the property over and above the amount due on the mortgage on the footing of the account so taken. If that is so, the set-off allowed by the lower Court is plainly contrary to law.

The rent decree must be executed as it stands, having regard to the fact that the provisions of the Act do not apply to it, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the respondent to redeem on favourable terms, not for entitling him to recover anything from the appellant.

The decree of the lower Court is reversed and the Darkhast is remanded to the Subordinate Judge to be executed according to law.

Costs up to this throughout upon the respondent.

Costs incurred hereafter to abide the result.

HEATON, J.:—I have very great sympathy with the decision which has been arrived at by both the lower Courts; and I have no doubt that our decision will be received by them with considerable surprise and will be regarded as militating against the intention of the Dekkhan Agriculturists' Relief Act. But, after all, we have to administer the law as it is, not as we think it ought to be. And although, both the lower Courts have regarded

⁽¹⁾ (1889) 14 Bom. 19.

the claim which the decree-holder has made in execution of his decree with some thing almost amounting to amazement, and as something, which if allowed, would be grossly unfair; yet it is to be remembered that the decree for redemption has only been made by setting aside the terms of the mortgage, that is, by setting aside the contract between the parties, which the Dekkhan Agriculturists' Relief Act allows the Judge to do and by then proceeding to take an account in which only a moderate rate of interest is allowed. If the mortgage contract had been allowed to proceed, unaffected by the provisions of the Dekkhan Agriculturists' Relief Act, the mortgagee would still be entitled to the possession of the land, would be entitled to the annual profits, and would so remain for something like ten years more. And, therefore, although it is pointed out very clearly and emphatically that the mortgagee has received considerable sums in excess of what after the account was taken under the Act, was found due to him, yet it must be remembered, that all that he has received, and also all that he claims under this decree which he now seeks to execute would be due to him but for the operation of the Dekkhan Agriculturists' Relief Act, and even after he has executed the decree, the mortgagee will have obtained far less than he would have received if the contract between the parties had been allowed to proceed. This may be an example of the great need that the Court should be allowed to break contracts of this kind and re-settle the relations between the parties on a fair basis. But it seems to me that there is nothing that can be described as unjust or unfair in allowing a creditor to receive that which the law entitles him to receive and permits him to receive. Until the Dekkhan Agriculturists' Relief Act was introduced into the Dhárwár District, the mortgagee in this case was entitled to the rent fixed by the rent-note, and he was entitled to that for the years for which he obtained the decree for it. That decree was perfectly right as the law then stood. It has never been set aside, and it seems to me that we are bound to let that decree be executed whatever our opinions may be as to whether the decree-holder is fairly entitled to the rent or not. We are bound to let that decree be executed unless it can be shown that in law, or for

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some reason or another recognized by the law, it ought not to be executed. It is one of the first principles of our law, that when a decree is made, that decree, unless set aside by a Court of competent jurisdiction, is a good decree and the holder of it can enforce execution of it until it becomes time-barred. Therefore this decree must be executed unless it has been satisfied, and nobody contends that it has, or unless there is some set off which can be placed against it. Nobody can make out anything in the nature of a legal set off; or that there is any money due by the mortgagee to the mortgagor which the latter is entitled to say must be regarded as payment of the decree in whole or in part; because although in the redemption suit, it was found that under the method of taking accounts peculiar to the Dekkhan Agriculturists' Relief Act the mortgagee's debt was more than paid off, yet the mortgagor has not obtained a decree on the excess payments and therefore they cannot be pointed to as monies due from the mortgagee to the mortgagor. Therefore, as the decree is still in force and has not been paid and there is nothing which can be pointed to as a set-off in law against what is due under that decree, it seems to me that it must be allowed to be enforced.

This result is not more peculiar than that which was arrived at recently in England in the case of *Poulton v. Adjustable Cover and Boiler Block Company*⁽¹⁾. In that case it was held that a decree obtained must be enforced though after events showed that no such decree would have been made had the true circumstances been known. Here we have a decree perfectly lawful and good and not based on any misconception of fact, but it is proposed to forbid its execution on account of a change in the law made after the decree was obtained, which change does not either directly or by implication affect the decree. That change in the law cannot be permitted to annul the decree.

Decree reversed.

R. R.

⁽¹⁾ [1908] 2 Ch. 430.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

RHIMBAI JAMALBHOY (ORIGINAL PLAINTIFF 1), APPLICANT, *v.* MARIAM BINTE ABDUL RASOOL AND OTHERS (ORIGINAL DEFENDANTS),
OPPOSENTS NOS 1, 4 TO 9 AND 11.*

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Aden Act (II of 1864), sections 8 and 15(1)—Court-fees Act (VII of 1870), section 7, sub-section 4, clauses (c) and (d)—Suits Valuation Act (VII of 1887), section 8—Civil Procedure Code (Act XIV of 1882), section 551—Civil Procedure Code (Act V of 1908), section 115—Valuation for the purposes of Court-fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction.

The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards Rs. 50,000. The claim being for declaration and injunction was, under the provisions of the Court-fees Act (VII of 1870),

* Application No. 8 of 1909 under extraordinary jurisdiction.

(1) Sections 8 and 15 of the Aden Act (II of 1864) are as follows :—

8. No appeal shall lie from any decision or order of the Resident given or made by him, whether in the exercise of his original jurisdiction, or in the exercise of his jurisdiction as a Court of Appeal or of revision ; but if in the trial of any suit in which the claim estimated as aforesaid shall not exceed one thousand rupees in value, any question of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, on which the Resident shall entertain doubts, the Resident may, either of his own motion, or on the application of any of the parties to the suit, draw up a statement of the case and submit it, with his own opinion, for the decision of the High Court of Judicature at Bombay.

And if in the trial of any suit or the hearing of an appeal in any suit in which the claim, estimated as aforesaid, shall exceed one thousand rupees in value, any question of fact or of law or of usage having the force of law or of the construction of a document affecting the merits of the decision shall arise, the Resident shall, on the application of any of the parties to the suit, or he may of his own motion, draw up a statement of the case and submit it with his own opinion for the decision of the said High Court.

15. In the administration of civil justice, the Court of the Resident shall be guided by the spirit and principles of the laws and regulations in force in the Presidency of Bombay, and administered in the Courts of that Presidency not established by Royal Charter, and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts.

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section 7, sub-section 4, clauses (c) and (d) valued by the plaintiff at Rs. 130 upon which the prescribed Court-fee stamp was Rs. 10 only. The Assistant Resident rejected the plaint on the ground that it was not properly stamped.

Against the order of the Assistant Resident the plaintiff appealed to the Resident at Aden, and on the 23rd September 1908 presented an application under section 8 of the Aden Act (II of 1864) to state a case to the High Court upon certain questions specified in the application. The Resident, however, on the next day, that is, on the 24th September summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). The judgment dismissing the appeal was read out to the plaintiff on the 7th October following, when she attended the Court.

The plaintiff, thereupon, preferred an application for revision to the High Court praying that the order dismissing the appeal might be quashed and that the Resident be required to state a case.

A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864),

Held, that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of section 8 of the Aden Act (II of 1864) the Resident's Court is subordinate to the High Court.

Under section 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts, the provisions of the Suits Valuation Act (VII of 1887) are 'the law for the time being for the valuation of claims' in the Courts of the Resident of Aden.

Held, further, that the plaintiff's claim being valued at Rs. 130 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court, it did not fulfil the requirements of section 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against the decision of E. de Brath, Major-General, Political Resident at Aden, summarily dismissing an appeal against the order passed by Major J. R. Carter, Assistant Resident, rejecting a plaint on the ground of the insufficiency of the Court-fees stamp.

One Dadabhoy Ganibhoy, a resident of Aden, died at that place in the year 1904 leaving him surviving a widow Rhimbai, children and grand-children. The deceased was possessed of considerable moveable and immoveable property consisting of houses, cash, shop-goods, pearls, etc. The Court of the Resident at Aden took charge of the said property and realized about Rs. 53,000 by its sale. After the sale the heirs of the brothers of the deceased claimed a three-fourths share in the proceeds of the sale and the Resident's Court proposed to distribute that share among the claimants and to give the remaining one-fourth share to the widow and the children of the deceased. The widow, Rhimbai, and the children of the deceased brought a Suit No. 176 of 1907 against the claimants of the three-fourths share in the Court of the Assistant Resident at Aden for a declaration that the plaintiffs were the sole legal heirs of the deceased Dadabhoy Ganibhoy and as such entitled to receive the whole of the property of the deceased according to their respective shares, free from the claims of the defendants. The plaintiffs also prayed for an injunction restraining the defendants from receiving from the Court any portion of the said estate. The claim was valued at Rs. 130 and the plaint was engrossed on a Court-fee stamp of Rs. 10. The Assistant Resident found that the plaint was insufficiently stamped and gave a month's time to the plaintiffs to make up the requisite stamp. The plaintiffs having failed to do so, they presented an application praying for extension of time and for amendment of the plaint. The Assistant Resident refused the application and passed an order rejecting the plaint under section 54 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs preferred an appeal, No. 3 of 1908, against the said order to the Court of the Resident and subsequently on the 23rd September 1908 applied to that Court to refer the case for the opinion of the High Court at Bombay under section 8 of the Aden Act (II of 1864) on the following question:—

Is the plaint sufficiently stamped, and, was the order of the Court rejecting the plaint under section 54, clause (b) of the Civil Procedure Code without making an order, what the requisite stamp should be, legal?

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On the 24th September 1908 the Resident summarily dismissed the appeal under section 551 of the Civil Procedure Code, 1882.

On the 28th September 1908 the plaintiffs applied to the Resident to be informed as to what became of the appeal and they were, in reply, required to attend the Court-house on the 7th October following in connection with the appeal. On the appearance of the plaintiffs in Court on that day, the judgment of the Court dismissing the appeal was read and recorded.

Against the said order dismissing the appeal, Rhimbai preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging *inter alia* that the Resident erred in law in not referring the case for the opinion of the High Court under section 8 of the Aden Act (II of 1864), that he acted beyond jurisdiction in passing his order without making a reference to the High Court, that he failed to exercise a jurisdiction which he ought to have exercised and that he acted with material irregularity in the exercise of his jurisdiction. A *rule nisi* having been issued calling on the opponents (defendants) to show cause why the decision of the Resident should not be set aside,

K. N. Koyaji appeared for the applicant (plaintiff 1) in support of the rule.

L. A. Shakh appeared for the opponents (defendants) to show cause:—We have to urge a preliminary objection. The applicant is not entitled to ask this Court to interfere with the decision of the Resident in revision because section 115 of the Civil Procedure Code, 1908, is not applicable. The Resident's Court at Aden is not subordinate to the High Court. The power of superintendence is given to the High Court only in certain particulars specified in some sections of the Aden Act. We rely upon the ruling of the Full Bench in *Khoja Shieji v. Hasham Gulam*⁽¹⁾. Even though appeals lay from the Zanzibar Court to the High Court, it was held that the High Court had no powers of revision over the Zanzibar Court. By the Aden Act neither an appeal nor a revisional application lies to the High Court.

(1) (1895) 20 Bom. 480.

[SCOTT, C. J., referred to *Abdul Karim v. The Municipal Officer, Aden*⁽¹⁾, affirmed by the Privy Council in *Municipal Officer, Aden v. Ismail Hajee*⁽²⁾.

In *Abdul Karim v. The Municipal Officer, Aden*⁽¹⁾, only the power of the High Court to remove a suit from the Resident's Court and to try and determine it itself under clause 13 of the Letters Patent was declared. It did not declare any revisional powers to be in the High Court and the Privy Council merely affirmed the decision of the High Court. The fact that the transfer was not ordered under section 25 of the Civil Procedure Code, 1882, shows that the Resident's Court could not be subordinate to the High Court. See section 2 of the Civil Procedure Code, 1882, and section 3 of the new Code, 1908.

K. N. Koyaji for the applicant (plaintiff 1) in support of the rule:—The Full Bench ruling in *Khoja Shivji v. Hasham Gulam*⁽³⁾ is in our favour. The judgment of Sir Charles Sargent, C. J., in that case shows that it was merely because the High Court of Bombay was made by the Zanzibar Order in Council to be only an appellate Court to hear appeals in Civil cases from Zanzibar, that there was no power of revision in the High Court. In Criminal cases the High Court of Bombay is, under section 9 of the Order in Council, to be deemed the High Court and not merely an appellate Court, and this difference was clearly pointed out by Sir Charles Sargent, C. J. Under the Aden Act, the powers of superintendence and revision are expressly given to the High Court over the Resident's Court at Aden. Besides Zanzibar is not a part of the Bombay Presidency, but Aden is, and this circumstance makes the Court at Aden subordinate to the Bombay High Court. See section 16 of the Letters Patent.

Abdul Karim v. The Municipal Officer, Aden⁽¹⁾, affirmed by the Privy Council in *Municipal Officer, Aden v. Ismail Hajee*⁽²⁾ establishes the power of the High Court to superintend or revise the acts and decisions of the Court at Aden. Superintendence and revision are interchangeable terms. Superintendence may be more comprehensive than revision but it cannot exclude

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(1) (1903) 27 Bom. 575.

(2) (1905) 30 Bom. 246.

(3) (1895) 20 Bom. 480.

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revision. The ruling in *Abdul Kerim v. The Municipal Officer, Aden*⁽¹⁾, points out that superintendence is not only a ministerial but a judicial power. Superintendence implies appellate jurisdiction and *vice versa*; *Perbhai Khimji v. B. B. & O. I. R. Co.*⁽²⁾. Section 15 of the Charter Act and section 16 of the Letters Patent act and re-act on each other. The decision in *Gabind-sundari Debi v. Jagadamba Debi*⁽³⁾ covers exactly a case like the present. Section 2 of the Civil Procedure Code, 1882, and section 3 of the new Code, 1908, are not meant to give exhaustive definition of "Subordinate Courts." The application of section 13 of the Letters Patent in any case does not mean that section 25 of the Code of 1882 or section 24 of the Code of 1908 is necessarily inapplicable. Therefore in the present case either section 115 of the new Code or section 15 of the Charter Act may be applied. But apart from all general arguments, it is enough for our purpose to confine attention to section 8 of the Aden Act. That section makes it imperative for the Resident to refer a case to the High Court where the claim exceeds Rs 1,000 in value. This circumstance gives the High Court the power to direct the Resident at Aden to refer a case to the High Court. The Resident may otherwise act capriciously. At any rate for the purposes of section 8 of the Aden Act, section 115 of the new Code, 1908, or section 15 of the Charter Act must apply.

Coming to the merits, the claim here was more than Rs. 1,000 in value and so the Resident was bound to submit a case for the decision of this Court under section 8 of the Aden Act when we made an application to him to that effect.

Shah for the opponents (defendants) to show cause:—The application for reference to the High Court was made on the 23rd September 1908 and it is not shown that the appeal was heard on that day. The judgment was written on the 24th September and it was pronounced on the 7th October following. The applicant (plaintiff) cannot therefore claim the benefit of section 8 of the Aden Act which requires the application for reference to be made "in the trial of any suit or the hearing of an appeal." Secondly, the claim does not exceed Rs. 1,000 in value. The

⁽¹⁾ (1908) 27 Bom. 575.

⁽²⁾ (1871) 8 Bom. H. C. R. (O. C. J.) 59.

⁽³⁾ (1870) 6 Ben. L. R. 168 at p. 170.

Aden Act requires the claim to be "estimated according to any law for the valuation of claims for the time being in force," and the Court-fees Act and the Suits Valuation Act lay down the law for the valuation of claims at the present day. The present claim being for declaration and injunction, the value of the claim for the purposes of Court-fees is that mentioned in the plaint, which is Rs. 130, and the same is the value of the claim under section 8 of the Suits Valuation Act for the purpose of jurisdiction. Under section 15 of the Aden Act the Court of the Resident at Aden is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts. Hence the valuation prescribed by the aforesaid Acts must be taken to be the valuation for the purposes of section 8 of the Aden Act. As the claim did not exceed Rs. 1,000 according to such valuation, the Resident was not bound to submit the case to this Court.

Koyaji in reply :--The words "in the trial of any suit or the hearing of an appeal" in section 8 of the Aden Act mean during the trial of any suit or during the hearing of an appeal and not at the hearing of a suit or appeal.

The claim is to be estimated according to the law for the valuation of claims and not of suits. The words in sections 5—8 of the Aden Act clearly imply a distinction between suits and claims therein; otherwise the wording would have been, in any suit estimated according to the law for the valuation of suits for the time being in force. The sections of the Aden Act are to be construed in the same way as section 596 of the Civil Procedure Code, 1882, corresponding with section 110 of the new Code, 1908. The right of appeal depends on the real value and not the value fixed for the purposes of Court-fees: *Mohun Lall Sookul v. Bebee Doss*⁽¹⁾, *Baboo Lekraj Roy v. Kanhya Singh*⁽²⁾, *Pichayee v. Sivagami*⁽³⁾, *Hari Mohan v. Surendra Narain Singh*⁽⁴⁾, *Musst Aliman v. Musst Hasiba*⁽⁵⁾. The Suits Valuation Act

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determines the values of suits and not claims and it is for the purposes of jurisdiction of the Courts in which suits have to be filed and not for purposes of appeals. According to the law for the valuation of claims, they are to be valued according to the market price. The provisions of section 40 of the Punjab Courts Act, 1884, are similar to those of section 8 of the Suits Valuation Act and it has been laid down by a Full Bench in Civil Judgment No. 24 of the Punjab Records for 1903 that the value of the claim under that section for purposes of appeal was not the same as under Suits Valuation Act.

Section 15 of the Aden Act need not be invoked as the Court-fees Act and the Suits Valuation Act are actually in force in Aden inasmuch as those Acts extend to the whole of British India. But we submit that those Acts have nothing to do with the question of valuation of claims under section 8 of the Aden Act.

Our grievance is that our plaint was rejected on the ground that it was insufficiently stamped because we valued the claim at Rs. 130 and not at Rs. 53,000 for the purposes of Court-fees. We contend that this is contrary to the rulings of this Court. *Manohar Ganesh v. Bawa Ramcharandas*⁽¹⁾, *Sardarsingji v. Ganpatsingji*⁽²⁾, *Parvatibai v. Vishwanath*⁽³⁾, *Vachhani v. Vachhani*⁽⁴⁾. For the purposes of the Court-fees we gave the correct valuation at Rs. 130 according to the said rulings, but for purposes of jurisdiction the value was Rs. 53,000. But when come up here in revision we are met with the contention that the value of the claim is Rs. 130. Thus we get no relief.

SCOTT, C. J. :—This is an application by the plaintiff in a suit filed in the Court of the Resident at Aden that an order dismissing an appeal in the suit under section 551 of the Civil Procedure Code may be quashed and that the Resident may be required to state a case upon certain questions specified in an application, dated the 23rd of September 1908, made the day before he delivered judgment in the appeal, it being contended that the

(1) (1877) 2 Bom. 219.

(2) (1892) 17 Bom. 66.

(3) (1904) 29 Bom. 207.

(4) (1908) 33 Bom. 307.

obligation to state such a case was imposed upon him by the provisions of section 8 of the Aden Act II of 1864.

A preliminary objection was taken on behalf of the opponents that this Court has no jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his civil jurisdiction under the Aden Act, on the ground that the Resident being only subject to the High Court of Bombay in certain specified particulars under the Act with regard to civil jurisdiction his Court could not be said to be a Court Subordinate to the High Court within the meaning of section 115 of the Civil Procedure Code.

Now with regard to questions which should be stated by the Resident for the decision of the High Court under the provisions of section 8 of the Aden Act there can, we think, be no question that the Resident's Court is Subordinate to the High Court, for the Resident is, after the decision of the High Court given upon the questions submitted by him under that section, bound to pass a decree and to dispose of the case conformably to the decision of the High Court. We think, therefore, that with regard to such questions, this Court has the power of revision under section 115 of the Code in order that the Resident may not refuse to exercise the jurisdiction given to him by that section and may not act with material irregularity in the exercise of such jurisdiction without the power of the superintending Court to interfere. We, therefore, decide the preliminary objection against the opponents.

The next question is whether the Resident has refused to exercise the jurisdiction vested in him under section 8 or has acted with material irregularity in the exercise of such jurisdiction.

It appears that on the 14th of August 1908, a petition of appeal was presented to him from the decision of his Assistant Resident, Major Carter, in Suit No. 176 of 1907, rejecting the plaint on the ground that it was not properly stamped. The petition of appeal, according to the practice in Aden, where Pleaders are not usually heard, stated the arguments of the appellants and referred to the authorities on which they relied and nothing

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more was heard of the appeal until an application, made to the Resident on the 28th of September 1908, requesting that the applicant might be informed as to what had become of the appeal, received on the 30th of September, a response requiring the appellants to attend the Court-house on the 7th of October in connection with the appeal. Prior to the application of the 28th of September, namely, on the 23rd of September, the appellants had applied under section 8 of the Aden Act for reference of the following questions in the above appeal for decision of the High Court of Bombay, namely, "Is the plaint sufficiently stamped, and, was the order of the Court rejecting the plaint under section 54, clause (b) of the Civil Procedure Code, 1882, without making an order, what the requisite stamp should be, legal?"

On the 7th of October the plaintiff attended at the Court of the Resident and a judgment was then read out dismissing the appeal under section 551. The judgment is dated 24th of September.

Neither the judgment nor the records of the case indicate that the Resident took any notice whatever of the application made on the 23rd of September that a case should be stated under section 8.

The question is, whether in ignoring that application so far as the records of the case indicate, the Resident acted with material irregularity in the exercise of his jurisdiction or refused to exercise the jurisdiction vested in him by law.

Now one of the conditions entitling a litigant at Aden to demand the statement of a case for the decision of the High Court by the Resident is stated in section 8 to be the trial of a suit or the hearing of an appeal in which the claim estimated according to any law for the valuation of claims for the time being in force shall exceed Rs. 1,000 in value. In the present case the claim of the plaintiff was for a declaration and injunction with reference to certain property of a deceased resident in Aden alleged to be of the value of upwards Rs. 50,000 regarding which there was a dispute as to whether the plaintiff was entitled to the whole or a quarter share.

The claim being for declaration and injunction was under the provisions of the Court-fees Act, section 7, sub-section (4), clauses (c) and (d), valued by the plaintiff at Rs. 130, upon which the prescribed Court-fee stamp was Rs. 10 only.

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For the purpose of jurisdiction in the Bombay Presidency, the Suits Valuation Act VII of 1887, section 8, provides that "where in suits other than those referred to in the Court-fees Act, 1870, section 7, paragraphs V, VI and IX and paragraph X, clause (d), Court-fees are payable *ad valorem* under the Court-fees Act, 1870, the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same."

Therefore, as under section 15 of the Aden Act, the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts, we have in the provisions of the Suits Valuation Act, to which we have referred, 'the law for the time being in force for the valuation of claims.'

Assuming that the plaintiff's claim has been correctly valued under the Court-fees Act, as appears to be the case on a consideration of the decisions of this Court reported in *Manohar Ganesh v. Bawa Ramcharandas*⁽¹⁾, *Sardarsingji v. Ganpatsingji*⁽²⁾, *Parvatibai v. Vishvanath*⁽³⁾, *Vachhani v. Vachhani*⁽⁴⁾, her claim estimated according to the law for the valuation of claims for the time being in force would be Rs. 130. It is, therefore, a claim which does not fulfil the requirements of section 8 of the Aden Act so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in her suit.

For these reasons we cannot hold that the case calls for any interference under section 115 of the Code, and we dismiss the application with costs.

Application dismissed.

G. B. R.

(1) (1877) 2 Bom. 219.

(3) (1904) 29 Bom. 207.

(2) (1892) 17 Bom. 56.

(4) (1908) 33 Bom. 307.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

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October 6.

PARAMI KOM RAMAYYA (ORIGINAL PLAINTIFF), APPELLANT, v. MAHA-DEVI KOM SHANKRAPPA (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Maintenance—Maintenance allowed by will of husband to wife—Unchastity of wife after husband's death—Maintenance not affected—Widow—Unchastity—Starving maintenance.

A Hindu widow was entitled to maintenance at the rate of Rs. 24 a year under her husband's will. After the husband's death, the widow led for some time an unchaste life and gave birth to a child: but since then she remained chaste. She sued to recover maintenance allowed to her under her husband's will. It was contended in reply that the plaintiff, on account of the unchaste life which she had led for some time after her husband's death, had forfeited her right even to bare or starving maintenance.

Held, negating the contentions, that though the annuity was granted by the will as "maintenance" that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will.

The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship.

The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rights, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence.

Honamma v. Timannabhat⁽¹⁾; *Valu v. Ganga*⁽²⁾; and *Vishnu Shambhog v. Manjamma*⁽³⁾, discussed.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kanara, reversing the decree passed by R. R. Sane, Subordinate Judge of Sirsi.

*Second Appeal No. 763 of 1908.

(1) (1877) 1 Bom. 559.

(2) (1882) 7 Bom. 84.

(3) (1884) 9 Bom. 108.

Suit to recover maintenance.

The plaintiff, Parami, was the widow of one Ramayya who died in 1890. Ramayya had a daughter Mahadevi (defendant) by his first and predeceased wife.

Previous to his death, Ramayya had made a will whereby he left the whole of his property to his daughter Mahadevi, and provided for maintenance at the rate of Rs. 24 a year for his wife, Parami. The provision as to maintenance ran as follows :—

“ But if the said Parami and Timappa Hegadi (the executor) should not pull on harmoniously, then, from the date on which the difference arises, the said Timappa Hegadi or the *Mane Aliya*† who may take possession of the property according to this will should go on paying to her, only as long as she lives, maintenance at the rate of Rs. 24 per annum on the responsibility of my property.”

It appeared that after Ramayya's death, Parami had led an unchaste life and had a son born of her. But she soon returned to a chaste life which she had maintained upwards of eight years before suit.

In 1906, Parami sued to recover the arrears of six years' maintenance before suit.

The defendant contended that the plaintiff was disentitled to maintenance on account of the unchaste life she had led.

The Subordinate Judge examined the Hindu Law texts bearing upon the subject : and arrived at the conclusion that there was nothing in Hindu Law to deny to a widow even starving maintenance on the ground of her past unchastity. Upon her right to receive the maintenance under the will, he remarked as follows :—

Even apart from these considerations there is another strong reason to hold that the plaintiff is entitled to get the said allowance from defendants. The plaintiff's husband's will (exhibit 15), under which the defendants hold his property, contains an express direction, that the defendants should maintain plaintiff, or in case of disagreement, should annually pay her Rs. 24 as a separate allowance. It is not stated in the will that the allowance should be payable to plaintiff so long as she would remain chaste. Plaintiff's chastity was not made a condition precedent to her getting the allowance. In the absence

† A son-in-law who makes his home in his father-in-law's house.

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of any express direction to that effect in the will, I do not think that the plaintiff has forfeited her right to the allowance, which to all intents and purposes is like an annuity for life. The defendants are bound to respect the wishes of the testator

On appeal, this decree was reversed by the District Judge on considerations which he expressed as follows —

The learned Subordinate Judge has written an interesting and careful judgment. But, when all is said, it simply amounts to this that he prefers the *dicta* in *Kandasami v. Murugammal* (19 Mad 6) and *Roma Nath v. Rajonimoni* (17 Cal 674), to the definite pronouncements of the Bombay High Court in *Valu v. Ganga* (7 Bom. 84) and *Vishnu v. Manjamma* (9 Bom. 108). I do not think that such a course is open to us. We are bound to follow the decisions of our own High Court, even if the other High Courts disapprove of those decisions. I arrive at this conclusion with regret, as the maintenance sought is only a pittance of Rs 2 a month and defendants are cruel in refusing it.

It is urged for plaintiff that no Hindu Law need be applied, as in this case the annuity of Rs. 24 a year was left to the widow as a legacy and defendant 1, her daughter, the residuary legatee, was bound to give effect to it under the common law. There would be force in this argument if the will did not clearly state that the annuity should be paid to plaintiff as maintenance allowance. But as it was ordered to be paid on that account, the fact that it was bequeathed (instead of being given in some other way) does not seem to absolve plaintiff from the duty of fulfilling such conditions as a Hindu widow drawing maintenance allowance must fulfil. And one of these conditions is chastity. It can hardly be supposed that the testator intended to free his widow from this duty.

I wish it could be held otherwise. But it is useless to waste time in bewailing the severity of the Hindu Law as interpreted by authority.

The plaintiff appealed to the High Court.

Nilkanth Atmasam, for the appellant.

D. G. Dalvi, for the respondent.

CHANDAVARKAR, J.:—This second appeal arises out of a suit brought by the appellant to recover arrears of maintenance from the respondents. Both the Courts below have found that the appellant's husband Ramayya died in February 1890, devising all his property by a will to the respondents. The will contains a provision that the respondents should maintain the appellant

in case she lived with them, but that, if owing to disagreement she lived apart they should give her Rs. 24 a year for her maintenance.

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It is also found by the lower Courts that after the husband's death the appellant led for some time an unchaste life and gave birth to a child ; but that since then she has been chaste.

Upon these facts the respondents contended in the Court of first instance that, on account of the unchaste life which the appellant had led for some time after her husband's death, she had forfeited her right even to bare or starving maintenance. In support of that contention they relied on two decisions of this Court—*Valu v. Ganga* ⁽¹⁾ and *Vishnu v. Manjamma*.⁽²⁾

In an able judgment, which is to be commended for a careful collation and examination of original texts, the learned Subordinate Judge (Mr. R. R. Sane) held that these decisions were not applicable to the present case, first, because, "the rule there laid down seems to have been based on certain passages from the Mitakshara and the Mayukha, which refer to the maintenance either of the wives of disqualified heirs or of the widows of deceased coparceners ;" and, secondly, because, "it did not clearly appear from the reports that the attention of the learned Judges, who were parties to the decisions in question, was drawn to some verses from the Smriti of Yajnyavalkya and Vijnaneshwara's commentary thereon, relating to the treatment to be given to degraded persons or outcastes in general." On the strength of these verses, cited in his judgment, and also of the provision in the will, the Subordinate Judge held that the appellant was entitled to "bare" maintenance and awarded the claim.

On appeal by the respondents, the District Judge of Kanara held that, whether the decisions of this Court in *Valu v. Ganga* ⁽¹⁾ and *Vishnu Shambhog v. Manjamma* ⁽²⁾, were right or not according to the texts of Hindu Law, they were binding all the same on the subordinate Courts. As to the provision in the will, he held that the annuity of Rs. 24 a year, having been given to the

(1) (1882) 7 Bom 84.

(2) (1884) 9 Bom. 108.

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widow in express terms "as maintenance allowance", must be presumed to have been intended by the testator to be subject to the condition that the appellant should lead a chaste life. Accordingly, the District Judge reversed the Subordinate Judge's decree and dismissed the suit.

On second appeal it is argued that the texts, on which the learned Subordinate Judge has relied in his judgment apply to the facts of this case, and that the rule to be gathered from those texts is that a Hindu widow, who has at one time led an unchaste life, is entitled at least to starving or bare maintenance, if she has subsequently returned to a life of chastity.

The first set of texts ⁽¹⁾ noticed by the Subordinate Judge occurs in Yajnyavalkya in the chapter on "marriage" in the section which treats of "Rituals." The first text, verse No. 70, relates to an adulterous wife, and, as correctly translated by the Subordinate Judge, it runs as follows: "She is to be allowed to live (by the husband in his own house), deprived of her rights, poorly dressed, fed with a view to sustain life only, dishonoured, sleeping on the ground." This obviously relates to a wife, who is leading a life of unchastity, is unrepentant, and is not purified by means of expiatory rites. In the case of one so purified, the general rule is that she is restored to all conjugal and social rights. As Apararka ⁽²⁾ puts it, "she, who has performed expiatory rites, becomes fit for conjugal and social association." And for that proposition he cites Manu, who says that "a wife, who has become purified after degradation, shall not be censured." This also follows from the next but one verse of Yajnyavalkya ⁽³⁾ and the explanation given of it by the Mitakshara. There the Mitakshara explains that only a certain class of degraded women must be "abandoned"—viz., a woman who has committed adultery with a man of a lower caste, and a woman who has committed any of the sins regarded as deadly by the *Shastras*. The Mitakshara also explains that even in the case of such women, "abandonment" (*tyaga*) does not mean entirely

(1) Verses 70 and 72 :—The Mitakshara : (Moghe's 3rd Edition, page 18).

(2) कृतप्रायश्चित्ता तु संन्यवहार्या भवति (Apararka : Anandashrama Series, Vol. I, page 98).

(3) Verse No. 72: The Mitakshara (Moghe's 3rd Edition, page 18).

forsaking and throwing them upon the world, helpless and hopeless. It means abandonment only "for the purposes of conjugal rights and religious ceremonies". That is, such women must be treated in the same way as women leading an unchaste life. They must be kept apart in the house and given just enough food and clothing to keep body and soul together, but all other relations of husband and wife must cease. The same view is taken by Nilakantha in his *Prayaschitta Mayukha*⁽¹⁾. Referring to a text in the *Chatur Vimsati Smriti*, which provides that "there should be no abandonment of any woman except in the case of such sins as the murder of a Brahmin and the like," he explains that even in such cases, a woman should be made to do penance in the house. Madhavacharya in his *Parashara Dharma Samhita* explains the law to the same effect (Sanskrit Bombay Series Edition, page 352, Vol II, part I).

The general rule to be gathered from these is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence.

The next set of texts of Yajnyavalkya⁽²⁾ noticed by the Subordinate Judge occurs in the Section on "Penances."

In that section Yajnyavalkya first deals with the question of expiatory rites which a degraded man has to perform before he can be restored to his caste. Then in verse 297 he deals with the case of a "degraded woman." He says that the same expiatory

(1) यत्तु चतुर्विंशतिमते ।

स्त्रीणां नास्ति परित्यागो ब्रह्महत्यादिभिर्विना ॥

तत्रापि ग्रहमध्ये तु प्रायश्चित्तानि कारयेत् ॥

[*Prayaschitta Mayukha* · Benares Edition, page 91].

(2) The *Mitakshara* : Verses 297 and 298 : (Moghe's 3rd Edition, page 432).

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rites that are prescribed for degraded men are ordained in the case of degraded women too, with this difference, however, that in the case of such women, even after their purification by means of expiatory rites, they do not become entitled to restoration of the conjugal and social rights which they had before degradation but they must be allowed to live "near" the house, provided with bare food and scanty clothing just to keep body and soul together, and they must be guarded. Literally interpreted, this would seem to apply to all degraded women, who have undergone purification. But Vijñaneshvara points out, in his remark introducing the next verse of Yajñyavalkya, that it applies only to a particular class of women, that is, to those whose degradation was caused by one of the sins considered deadly. It is such women only who, even after purification, must be *abandoned*. That is, while they become entitled to bare food and raiment and residence, they must be treated as unfit "for the purposes of conjugal rights and the performance of religious ceremonies." That is the definition and meaning of abandonment (*tyaga*) as given by Vijñaneshvara in his gloss on one of the verses of Yajñyavalkya in the first set of texts above noticed.

As is pointed out by Nilakantha in his *Prayaschitta Mayukha*⁽¹⁾, the word *tyaga* (*abandonment*) is explained in the Mitakshara as meaning the discarding of a woman so far as conjugal relations and religious ceremonies are concerned, but it does not mean driving her out of the house (that is, the husband's). No question of abandoning a woman for the purpose of conjugal relations and religious ceremonies can arise except as between a husband and his wife. The important question is whether this latter set of texts applies to the case of an unchaste widow or whether it applies only to the case of an unchaste wife. The learned Subordinate Judge thinks that the language of the texts is wide enough to cover both the cases. Nilakantha in his *Prayaschitta Mayukha*, in the course of his discussion of the question as to the right of degraded women to the performance of

(1) मिताक्षरायां तु व्यवहारनिरोध एव त्यागः शब्देनोक्तो न तु ग्रहान्निर्वासनमपीति.

(Prayaschitta Mayukha : Benares Edn., page 91.)

expiatory rites, cites some of the texts and along with them he quotes a text of Parashara⁽¹⁾ which provides that "a woman, who conceives a child from a paramour when her husband is either dead or is not to be found or has gone abroad, should be regarded as degraded and sinful and driven out of the country." Nilakantha explains "driven out of the country" to mean "driven out of the house."

This text of Parashara, which includes the case of a widow, is explained by Madhavacharya⁽²⁾ as relating only to a woman who is leading a life of unchastity, is unrepentant, and has not performed expiatory rites. As to a woman, whether she is wife or widow, who returns to a life of chastity after she has been unchaste, Madhavacharya explains that she, after expiation, cannot be cast out of the house, but that she must be maintained.

These texts of the *Shastras*, as explained by the commentators of recognised authority, would seem to support the decision of this Court in *Honamma v. Timannabhat*⁽³⁾ which has been dissented from in the two later decisions in *Valu v. Ganga*⁽⁴⁾ and *Vishnu Shambhog v. Manjamma*⁽⁵⁾. Doubt has been expressed in *Roma Nath v. Rajonimoni Dasi*⁽⁶⁾ and *Kandasumi Pillai v. Murugammal*⁽⁷⁾ as to the correctness of the decisions in *Valu v. Ganga*⁽⁴⁾ and *Vishnu v. Manjamma*⁽⁵⁾. It is not necessary for the purposes of this second appeal to decide the question, which, having regard to the conflict of authority in this Court, will have to be settled, when it arises, by a Full Bench. We have referred to it only to notice the texts which bear on the question that they may be of use on a future occasion.

- (1) जारेण जनयेद्धर्मं मृतेऽव्यक्ते गते पतौ ॥
तां त्यजेदपरे राष्ट्रे पातिता पापकारिणीम् ॥
'अपरे राष्ट्र' इत्युक्तेर्गृहान्निष्काशनं गम्यते.

(The Prayaschitta Mayukha : Benares Edn., page 91.)

- (2) Parashara Dharma Samhita, Bombay Sanskrit Series, Vol. II, Part I, page 352.

- (3) (1877) 1 Bom. 559.

- (5) (1884) 9 Bom. 108.

- (4) (1882) 7 Bom. 84.

- (6) (1890) 17 Cal. 674

- (7) (1895) 19 Mad. 6.

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In the present case the appellant has claimed maintenance not only under the Hindu Law but also under the provision in her husband's will allowing Rs. 24 a year to her as maintenance. The fact that the will expressly refers to the allowance as maintenance has led the learned District Judge to infer that chastity is an implied condition of the bequest. He thinks that the testator must be presumed from that expression to have intended that the allowance should be given subject to the condition of chastity on which the right of a Hindu widow to maintenance depends. No doubt "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property": *Mahomed Shumsool v. Shewukram*⁽¹⁾. But a Hindu's power to make a will has been held to be co-extensive with his power to make a gift *inter vivos*. Having regard to the texts relating to an unchaste wife discussed in the earlier part of this judgment and the rule propounded by Vijnaneshavara and Nilakantha, we must presume that the appellant's husband would have given her maintenance even in the event of her unchastity during his life-time. Such a presumption must be preferred to that which the learned District Judge has drawn on the construction of the word "maintenance" in the will, because the ordinary notions of the testator in such a case must be judged with reference to what he would have done if his wife had proved unchaste while he was alive. And what he would have done must be judged from what the *Shastras*, in the absence of usage to the contrary, ordain he was bound to do. According to the *Shastras*, he would have had to maintain his wife, unless she had misconducted herself with a man of a lower caste. There is no allegation against the appellant of such misconduct. Nor is it the case of the respondents that there is any custom which has broken in upon the rule of the *Shastras*. Further, though the annuity is granted by the will as "maintenance," that word cannot be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will. Where an implication

(1) (1874) L. R. 2 I. A. 7 at p. 14.

is to be made, it must be certain and necessary. The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship. Here there is neither. The mere fact that the word maintenance is used cannot affect the unconditional terms of the bequest.

On these grounds the decree of the District Judge must be reversed and that of the Subordinate Judge restored with the costs of both the appeals on the respondents.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton

MADHAVRAO MORESHVAR PANT AMATYA (ORIGINAL PLAINTIFF),
APPELLANT, v. KASHIBAI KOM DATTUBHAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS. * 1909
November 15.

Transfer of Property Act (IV of 1882), sections 55 (6) (b), 123—Registration Act (III of 1877), section 11—Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Sale—Gift—Hindu Law—Nibandha.

In consideration of services already rendered or thereafter to be rendered by the defendant to the predecessor-in-title of the plaintiff, the latter executed two documents whereby he released the defendant from payment to him of the assessment on certain lands. Those documents were not stamped or registered. The plaintiff sued to recover arrears of assessment from the defendant, who pleaded exemption under the two documents. The lower appellate Court found the transaction to be one of sale, and applying section 55 (6) (b) of the Transfer of Property Act, 1882, ordered the plaintiff to pay to the defendant what the Court calculated to be the equivalent of purchase-money before he (the plaintiff) could recover the assessment:

Held, that the transaction evidenced by the documents could not be regarded as a sale, for the consideration could not be regarded as "price";

* Second Appeal No. 420 of 1903.

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and even if it could be assessed in money value, it was vitiated by the fact that it was vague and uncertain as to future services.

Held, further, that the transaction must be regarded as one of gift. It was a gift of the grantee's right to assessment; and such a right is regarded as *nibandha* in Hindu Law and therefore immoveable property. The documents not having been registered, the gift did not operate.

Held, also, that there having been no registered instrument in support of the defendant's title the right set up in defence must be negatived.

SECOND appeal from the decision of J. D. Dikshit, Assistant Judge of Ratnágiri, amending the decree passed by S. S. Wagle, Subordinate Judge at Málwan.

The plaintiff sued to recover from the defendant assessment for three years at the rate of Rs. 58-0-10 a year.

The defendant contended that he was exempted from payment of the assessment. The exemption was claimed under two documents executed in his favour by one Sarvottamrao, a predecessor-in-title of plaintiff, in consideration of services rendered by the defendant to Sarvottamrao or thereafter to be rendered by him. The two documents were not stamped or registered, and ran as follows :—

EXHIBIT No. 28.

Rajeshri Sarvottamrao Nilkanth Pant Amatya, Inámdár, Mouje Chindar, to Bhau bin Devji Ghadi, residing at Mouje Chindar, Taif Salsi, táluca Málwan, as follows :—At the Mouje aforesaid there were disputes between myself and Gaukars, etc. Therein you acted truthfully and were useful to me in everything and at every time. Therefore, I have been pleased (to confer a grant upon you). (As to that). At the Mouje aforesaid there is Vatni Dhara (standing) in your name. There the thikáns purchased by you are included. The particulars of the said Thikáns are as follows :—.....Assessment amounting to Rs. 24-1-0 in all is granted as inám to you, your sons, grandsons, and others, from generation to generation. Therefore you should be useful to me in every business of mine at the aforesaid; you should be personally present and should see to my comforts in a proper manner. And you should go on enjoying the Inám as aforesaid from generation to generation. Do you note (the same)? The 16th of March 1893.

EXHIBIT No. 29.

Mandatory letter issued by Shrimant Rajeshri Sarvottamrao Nilkant Pant Amatya, Inámdár, Mouje Chindar, táluca Málwan, to Bhau Deoji Ghadi Gavkar, Mouje Chindar, táluca aforesaid as follows :—At (in connection with) the Mouje aforesaid, there was and there is litigation going on in the Court

between myself and Kulkarni and other Gaokaris. In that matter you took great pains and honesty and faithfully did and are doing my business. Having regard to the fact that you were careful about my business and worked zealously even more than myself if I had been present, I am very much pleased and therefore I have thought of conferring a grant upon you. As to that at the Mouje aforesaid there is a Vatni Dhara Khata No. 155 standing in your name (comprising land, acres 49-22½ gunthas assessment Rs. 54-10-3). You have been paying the assessment thereof to me in the village (a mandatory letter is issued to you) this day for 30th September 1903, out of the said amount as assessment payable in respect of land measuring acres 41-31 gunthas and formerly, that is, on the 16th of March 1893, a mandatory letter was issued to you for Rs. 24-1-0 payable in respect of land admeasuring acres 7-31½ gunthas under which the land is continued to you. Thus a mandatory letter is hereby issued to you directing that a deduction should be allowed as inám every year to you from generation to generation in your Kháta for Rs. 54-10-3 in all. Therefore you should from generation to generation go on taking credit in the Kháta for the amount of assessment every year. In respect of this, a separate mandatory letter is issued to the Vahivátdár Kárkún; as to that I will go on allowing deduction for the said assessment in the Kháta every year. To this effect this mandatory letter is duly given in writing. The 28th of January 1897.

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The Court of first instance held that there was for the transaction evidenced by the two documents a good consideration; and that the documents did not require registration. The Court, therefore, dismissed the plaintiff's claim to recover arrears of assessment.

On appeal the Assistant Judge treated the transaction as one of sale. He further held that under section 55 (6) (b) of the Transfer of Property Act, 1882, the defendant was entitled to a charge on the property for the purchase-money which was calculated to be Rs. 1,092-13-0. The plaintiff was, therefore, ordered to pay Rs. 1,092-13-0 to defendant before he recovered the assessment.

The plaintiff appealed to the High Court.

Weldon, with *K. N. Koyajee*, for the appellant.

A. G. Desai, for the respondent.

CHANDAVARKAR, J.—Both the lower Courts have held that the documents, on which the respondents relied in support of their case, were in the nature of a sale of immoveable property of the value of more than Rs. 100, and that, as those documents were not registered as required by section 54 of the Transfer of Pro-

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perty Act and by section 17 of the Registration Act, the respondents had not acquired the right to exemption from assessment which they pleaded in defence to the appellant's claim. But "sale", as defined in section 54 of the Transfer of Property Act, is "a transfer of ownership in exchange for a price paid or promised or part paid and part promised". And, as held by a Full Bench of three Judges of this Court in *Samaratmal Uttamchand v. Govind*⁽¹⁾, the word "price" is used in the sections relating to sales in the Transfer of Property Act in the sense of money. In the present case, it is found by the Courts below that the consideration for the transaction relied upon by the respondents consisted of services which they had rendered to the appellant's predecessor-in-title in the past and which they were to render in future. Such a consideration cannot be regarded as "price". The consideration, even if it could be assessed in money value, is vitiated by the fact that it is vague and uncertain as to future services. It is true that in his deposition the first respondent (defendant No. 1) states that he had rendered assistance to the Inámdár Sarvottamrao in certain suits, and that he had lent him monies from time to time. But there is no evidence to show that the remission of assessment by Sarvottamrao was in consequence of any contract of sale between him and the respondents and that the consideration for the contract moving from the latter was the price calculated at the money value of the services which they had rendered and the sum which they had lent to Sarvottamrao. The documents relied upon by the respondents, in support of their right to exemption from assessment make it quite clear that, as a reward for the services which the respondents had rendered and were expected thereafter to render to him, Sarvottamrao made a grant of the assessment to the respondents. The rendering of the services was not the consideration but merely the motive of the grant.

The transaction, on a proper construction of the document, must be regarded as one of gift, not of sale. It was a gift of Sarvottamrao's right to the assessment of the *dhára*, which the respondents held, and such a right has been regarded as *nibandha* in Hindu Law. *Morbhat Purohit v. Gangadhar Karkare*⁽²⁾. It is immoveable property. *Kenkaji v. Shidramapa*⁽³⁾ and *Madhavarao*

(1) (1901) 25 Bom. 696.

(2) (1888) 8 Bom. 284.

(3) (1894) 19 Bom. 663.

v. *Jagannath*⁽¹⁾. There can be no gift of immoveable property except by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. (Section 123 of the Transfer of Property Act). There being no such instrument in support of the respondents' title, the right they have set up in answer to the appellant's claim must be negatived.

But it was urged before us by their learned pleader that the transaction, evidenced by the documents relied upon by the respondents in support of their rights, was in the nature of a relinquishment by Sarvottamrao of his right to the assessment leviable on the *dhára* holding; that, as such, it could be proved by the *Anuinyapatra* (exhibit 30) which did not require registration, since it was not a deed of transfer but was an order addressed by Sarvottamrao to his own officers, and, as such, containing an admission of the relinquishment. No doubt the effect of the grant of the right to assessment leviable on the *dhára* holding was that the owner of the right, so far as he was concerned, relinquished it in favour of his grantee; but all the same it was a transfer of the right. The fact that the grantee of the right happened in the present case to be the person liable to pay the assessment was a mere accident. After the grant he could hold and deal with the right separately from the *dhára* holding. He could sell or mortgage or transfer by way of gift the latter right, reserving to himself the former. It was a transfer of the right to assessment by Sarvottamrao to the respondents as a bounty or reward for services rendered and to be rendered. Such a transfer cannot be made except in the manner provided by the Transfer of Property Act.

That being the legal aspect of the transaction, section 55, clause 6, sub-clause (b), which relates to a sale, has no application here.

The decree of the Court below must be varied by striking out from it the direction as to the payment by the plaintiff of Rs. 1,092-13-0 within one month from the date of the decree. In other respects the decree is confirmed. The respondents to pay to the appellant the costs of this second appeal.

Decree varied.

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ORIGINAL CIVIL.

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July 17.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*N. JOACHINSON AND OTHERS, APPELLANTS AND PLAINTIFFS, v.
MEGHJEE VALLABHDAS, RESPONDENT AND DEFENDANT.**Principal and Agent—Construction of Contract—Indian Contract Act (IX of 1872), sections 215-216—Agent appointed to sell goods buying them on his own account.*

Section 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account of the latter. The principal is free to exercise that right or not.

The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.

Salomons v. Pender(1) and *Andrews v. Ramsay & Co.*(2), referred to.

The plaintiffs, namely, N. Joachinson, J. Joachinson and S. Joachinson, all resided in Hamburg and did business as merchants in Bombay in the name, style and firm of Messrs. Worman and Co. by their constituted attorney Emil Schumacher. The defendant was a seed merchant carrying on business in Bombay.

On the 3rd of April 1907 the defendant signed two documents (exhibits B. and D.) purporting to be contracts of sale addressed to the plaintiffs in respect of 200 and 100 tons respectively of

* Appeal No. 55 of 1908. Suit No. 590 of 1907.

(1) (1865) 3 H. & C. 639.

(2) (1902) 2 K. B. 222.

Bombay cotton seed at the price of 103s. 9d. per ton C. I. F. (costs, insurance and freight payable by the defendant) less 2 per cent. at fixed exchange of 1s. 4 $\frac{7}{8}$ d. The two contracts were in the following forms:—

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"Bombay, April 3rd, 1907.

Contract of Sale No. 99.

To

Messrs. Worman and Co.,

Bombay.

Dear Sir,

I (we) herewith confirm the following sale through you on the terms and conditions mentioned herein (100) one hundred tons Bombay cotton seed f.a.g.

Prices 103s. 9d. per ton C.I.F. less 2 per cent.

Shipment to Hull

" in May 1907

} Exchange 1s. 4 $\frac{7}{8}$ d.

Insurance as usual.

Payment against Mate's receipt.

Remarks:—As per London Incorporated Oil Seed Association."

"I (we) herewith confirm the following sale through you, on the terms and conditions mentioned herein.....

"I (we) guarantee to the buyers the weights, quality and sound condition at the port of delivery and I (we) bind myself (ourselves) to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever, which the agents or buyers in Europe may bring against or on account of the goods or shipment immediately on demand, and I (we) agree to accept your or your agent's reports, decisions, accounts, final invoices and (or) other vouchers as correct and conclusive and binding upon me (us).

"With reference to this contract it is mutually arranged that no weighing or superintending charges should be charged but only arbitration charges and allowances (if any) and short weight (if any)."

In pursuance of these contracts the defendant handed over to the plaintiffs mate's receipts duly endorsed for 300 tons cotton seed shipped by him to Hull and the plaintiffs paid Rs. 17,000 against the receipts. On the 1st June 1907 bills were made out under the terms of the contract and the balance due to the defendant of Rs. 1,102-5-0 was paid to him on the 3rd June for which he gave a receipt in full payment;

The goods arrived at Hull on the 5th July and on the 10th August the plaintiffs informed the defendant that they had received a telegram from home that an allowance of 8s. 9d. a ton

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had been awarded by arbitration in respect of the 200 tons and 6s. 9d. in respect of the 100 tons. To this the defendant replied on the same day as follows:—

"It is very astonishing to note that both the said shipments are of one and the same quality and same marks and yet the allowances vary; in the first it is 6s. 9d. and in the other it is 8s. 9d. We think either you have misunderstood the telegram or there is something extraordinary in sampling the shipments for arbitration, because nearly 8,000 tons of the same mark and to the same port were shipped and almost all with the exception of very few passed without any allowance, and in the said few a trifling allowance, ranging from 6d. to 1s. 9d. per ton was awarded.

"We cannot agree to the awards stated by you and therefore request you to wire your home firm to attend on the spot and re-sample the whole of both the lots and have a survey held over same or to appeal against the said awards after re-sampling the same.

"We would like to nominate our surveyors and you will please let us know at once if you have any objection thereto."

The plaintiffs replied to this on the 12th August as follows:—

"In accordance with your letter of August 10th, which we have just received, we have sent a cable to our agent instructing him to re-sample and to appeal against the awards on your two shipments of cotton-seed."

The plaintiffs' agent at Hamburg cabled on the 14th August saying:—

"Shall we appeal against decision, fee £ 21 each case, re-sampling impossible, telegraph at once, am waiting in telegraph office."

This was communicated to the defendant on the 15th August: and not having received a reply the plaintiffs sent their representative Mr. Unvalla to the defendant; and after the interview they wrote saying: "We take note of your instructions to cable home for appeal, which has been done." To this the defendant returned the following reply:

"In the interval between..... (your) two letters your representative had seen us, to whom we gave instructions that under any circumstances resampling must be done, even of the remainder, if part is consumed, and it appears that your second letter is incomplete or you do not agree with the clear instructions. . . . We therefore again say that whatever shall be done without re-sampling shall not be binding upon us."

Further correspondence took place between the parties, which terminated with the plaintiffs' letter of the 25th August, wherein they stated "appeal has terminated unfavourably, awards con-

firmed". And the defendant replied to it next day saying "If the appeal is carried out without observance of the instruction . . . its decision is not at all binding upon us."

On the 19th September the plaintiffs sent to the defendant final accounts for shortage allowances, fee, &c., in respect of the two consignments. The defendant declined to pay and asked for inspection of document.

On the 17th November the plaintiffs filed this suit to recover the shortage allowance, &c., from the defendant. The defendant contended in his written statement that the plaintiffs as agents of the defendant had not carried out his instructions as regards the re-sampling and therefore he was not liable. Without prejudice to this defence Rs. 800 were paid into Court at the rate of 2s. 6d. per ton.

As Mr. Schumacher, the plaintiffs' constituted attorney in Bombay, who had transacted this business with the defendant, was about to leave India, he was examined *de bene esse* on the 22nd February 1908. In cross examination he said :—

"I was the principal in the contract. It was an out and out sale to me. This is the first time I have stated to the defendant that it was an out and out sale to me."

The defendant then alleged that the plaintiffs, according to this evidence, were making out a different case to that set out in their plaint, namely, that they were suing as principals and not as agents, and obtained leave to file a supplemental written statement, wherein he contended that the plaintiffs were his agents for sale being remunerated by a commission of 2 per cent., and were therefore bound to account to him for all their dealings with the said goods. He denied the goods were sold to the plaintiffs, as contended by Mr. Schumacher, as such contention was entirely contrary to the terms of the contract and inconsistent with the whole course of business between himself and plaintiffs and with the usual course of business between merchants and commission agents in Bombay. He counter-claimed for an account and asked for the suit to be dismissed.

The cause was tried by Macleod, J.

The learned Judge held that the contract goods were short in weight and of inferior quality when they arrived at Hull; that the

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plaintiffs did carry out the defendant's instructions in obtaining a fresh survey of the goods; and that the plaintiffs were acting under the said contracts as agents for sale of the defendant and were bound to account to the defendant for all their dealings in the said goods. The suit was, therefore, dismissed.

The learned Judge, in the course of his judgment, remarked as follows :—

“The evidence shows that it is the practice for export houses in Bombay to receive offers from their correspondents in Europe, without mentioning the name of the offerers, and the defendant certainly understood that he was accepting certain specific offers received from Europe by the plaintiffs. Although the plaintiffs knew they were as a matter of fact buying on their own account, they held themselves out as agents in the contracts they signed with the defendant, and they cannot now be allowed to say that they were acting as principals in the transactions. As agents they were not entitled to make any profit beyond what was contained in the contracts and as they sold at higher rate they are bound to account to the defendant for the excess. To hold otherwise would be to give an interpretation to the contracts which the words of the contracts cannot possibly bear. There is no ambiguity about the wording of the contracts and the ordinary rule of construction applies that the grammatical and ordinary sense of the words must be adhered to unless that would lead to some absurdity or some inconsistency with the rest of the instrument: *Gray v. Pearson*, (1857) 6 H. L. C. 106; *Caledonian Railway Company v. North British Railway Co.*, (1881) 6 App. Cas. 131.

“If I give the words ‘confirm the sale through you’ their ordinary and popular meaning, I cannot possibly hold that plaintiffs were purchasers. But it may be said that this is a mercantile contract and that these words have a special mercantile meaning. To support this contention there must be evidence. . . . In my opinion, defendant contracted to ship through the plaintiffs certain goods at a fixed price less 2 per cent. C. I. F. for a certain shipment to a fixed port for delivery to an unknown buyer. Plaintiffs contracted to pay the price fixed against mate's receipts in Bombay. As the plaintiffs did not take over the goods in Bombay or inspect them, defendant guaranteed to the buyers weight, quality and sound condition at the port of delivery and bound himself to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever which the agents' buyers in Europe might bring against or on account of the goods immediately on demand and agreed to accept plaintiffs' and plaintiffs' agents reports, decisions, accounts, final invoices, and other invoices as correct and conclusive and binding upon him. The plaintiffs took the risk of the buyers not taking delivery but as the sale was through them they could not derive

any profit by delivering at a higher price. The defendant trusted to the plaintiffs selling his goods at the rate he was paid in Bombay and no doubt if an allowance of 2s. or 2s. 6d. had been awarded on these 300 tons, he would have paid that without making any inquiries. If a misunderstanding about re-sampling and appealing had not occurred, he might still have paid the allowances. The fact that plaintiffs had realised higher prices would in the ordinary course of events never be revealed except by means of legal proceedings, but if plaintiffs contracted as agents, they cannot get rid of their liability to account arising from the contract.

"If the plaintiffs claim to be the purchasers in Bombay contrary to the express wording of the contract, their claim on the defendant's guarantee must fail, as that guarantee was given on the understanding that plaintiffs were acting as agents."

The plaintiffs appealed.

Strangman, Advocate General, and *Lang*, for the appellants.

It is quite unnecessary for the Court to find what was the relationship between the parties, the only question is whether or not the plaintiff is entitled to an account. The lower Court gave the relationship a name and said that certain incidents flowed from it. See Jenkins, C. J.'s judgment in *Paul Beier v. Chotalal*⁽¹⁾. It is impossible in Bombay to say what the relationship is. There have been three previous dealings between the parties two of which were put through and one settled. In neither cases were accounts demanded. Our first submission is that we must get a decree for what we have claimed.

There is no doubt that we have acted *bond fide*. They admit "to" and "through" in the contract are the same. The plaintiff is entitled to say "I am ready to account for what I have done."

As to the contract itself the heading is 'Contract of Sale.' We say the 2 per cent. is discount, they say it is commission. When the goods get to European ports they are surveyed, if the survey is disputed there is arbitration and an appeal: see rules. The defendant has according to the rules to accept all reports, etc. We undertook to pay all weighing and superintending charges, these amounted to 9d. in the ton, *i.e.*, $\frac{3}{4}$ per cent. Therefore if the 2 per cent. is commission it is at once reduced to $1\frac{1}{4}$ per cent.

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We also pay in England $2\frac{1}{2}$ per cent discount and something must also be allowed for brokerage, therefore we would have been working at a loss. The whole difficulty in the case arises through the word "through" to the contracts. The word does not necessarily imply an agency.

The finding of the lower Court only comes to this that the defendant thought that the plaintiff was an agent. Their own broker's evidence does not bear out their contention.

The conclusions to be drawn from the evidence are:—

- (1) The plaintiffs treated themselves as principals.
- (2) The plaintiffs never held themselves out as agents.
- (3) It is admitted that the defendant never asked for accounts.
- (4) The question of agency is an afterthought as witnessed by the original written statement and the fact that the moonim is not called.
- (5) It is immaterial which word is used "through" or "to"
- (6) Accounts under such contracts are never asked for.

If the Court comes to the conclusion that we are agents we must account. If they waive their right to accounts we must have our decree. The defendant's election does not prejudice our right on the other issues.

Jardine (with him *Robertson*), for the respondent.

There is a question of the *bond fides* of the plaintiff: we were induced to enter into this contract because we thought he was our agent who had no adverse interest. The facts show that he had adverse interests. They cannot say we have tried to evade payment. They say there is no need to define the relationship of the parties; the Court will look at the contract itself. Can the Court treat the word "through" as of no account. If you want an agent you say you do a thing "through" him.

[CHANDAVARKAR, J.:—You don't deny that evidence to the contrary may be given?]

No evidence was adduced beyond the statement made in cross-examination by the plaintiffs' constituted attorney; what was the object in putting in the word "through". We say you cannot.

say "through" is same as "to": see the heading "contract of sale" and the counterpart which says "sale through us."

The defendant pays freight insurance and costs. Why should we pay the costs if they are out and out purchasers. The 2 per cent, we say, is commission. The plaintiffs never wanted to give evidence as to the meaning of the 2 per cent. Schumacher says it is a custom to deduct 2 per cent discount but no custom is proved.

They now say the relationship is a complex one but we were not asked to meet that case in the lower Court. They held themselves out as agents both by the conversation we have alleged and by placing the contract before us

Strangman in reply.

Our points are:—

- (1) Is it necessary to define the relationship?
- (2) If so, has agency been made out?
- (3) If agency is made out to what relief are the plaintiffs entitled?

As to (1) the relationship was not defined in *Paul Beier v. Chotula*⁽¹⁾, there as here the plaintiff said that on the form of the contract there was a contract of vendor and purchaser and the defendant contended that it was an agency contract. The whole point is whether there is a liability on behalf of the plaintiffs to account. The evidence shows there is not. The defendant says he never asked for accounts. It is the wrong way to approach the case to try and bring this complex relationship under the head of agency.

On the question as to whether or not agency is made out. They say they were induced to enter into the contracts because they thought the plaintiffs would get the best price for them from England. But see the broker's evidence. The defendant never suggested that he did not get a fair rate. He could not do so because he knew well what the rates were as he was dealing in the same goods with Sassoon and others. That is all the evidence. There can be no question of prejudice here. It is quite im-

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material whether the plaintiffs were acting as principals or agents. Therefore on the question of agency we say (i) the Court cannot be asked by the defendant to hold agency in view of his first written statement and of his letter of 1st January 1908 where his attornies write "you contracted to purchase from our client", (ii) no stress should be laid upon the word "through" in view of the defendant's own admission that "through" is the same as "to", (iii) no accounts were asked for in the previous dealings and it is not the custom to demand accounts, (iv) if this is agency our benefits would be nil. As to (i) they say it is hard to hold the defendant to a slip, but why is the Moonim not called to explain the slip?

(3) But if agency is made out to what relief are the plaintiffs entitled? The lower Court says none under section 236 of the Contract Act. They rely on *Robinson v. Mollett*⁽¹⁾. Section 236 applies only to executory contracts. Section 215 does not apply to this case as there is no dishonest concealment established or that the dealings of the agents have been disadvantageous to the principal. The defendant can only say that he is entitled to an account of our profits.

CHANDAVARKAR, J.:—The first question argued on this appeal is, whether the relationship constituted between the appellants (plaintiffs) and the respondent (defendant) by the two contracts, on which the suit was brought, was one of agent and principal, or of purchaser and vendor. Both the contracts are in writing, and, judging from their terms alone, the conclusion is, I think, inevitable that the appellants accepted under them the business of agency to sell the goods for and on behalf of the respondent.

Each contract begins with these words:—"We", (*i.e.*, respondents), "herewith confirm the sale through you" (*i.e.*, appellants), words which are apt to convey the meaning that the latter were appointed to sell for the former. There is an admission, however, by the respondent in his deposition that "sale through you" and "sale to you" mean the same thing; and in his solicitors' letter to the appellants, exhibit A 14, the goods forming the subject-matter

(1) (1875) L. R. 7 H. L. 802,

of another contract are referred to as having been sold to the appellants. We must, therefore, look at the other terms and language of the contract to find the clear intention of the parties. Each of the contracts was on c. i. f. terms, that is, the respondent as vendor agreed to be liable for costs, insurance, and freight. The rate of exchange was fixed in each by the agreement of the parties. Each of these conditions may be as consistent with the relation of principal and agent as with that of vendor and purchaser. There is, however, extraneous evidence in the case, adduced for the respondent to show that these two terms are incompatible, according to the usage of trade, with the latter relation and mark an agency business. That evidence has carried weight with the learned Judge in the Court below. Each of the two contracts in dispute shows that there was a deduction of 2 per cent. in favour of the appellants from the purchase money advanced by them to the respondent and the latter has led evidence to prove that this 2 per cent., according to commercial usage, is treated as commission, though it is sometimes spoken of and described in a written contract as discount. This evidence also has been believed by the learned Judge. To all this evidence of usage the objection urged before us on appeal is that no questions as to usage of trade were put to Mr. Schumacher, the appellants' constituted attorney in Bombay, during his cross-examination. But the circumstances under which that cross-examination had to be made are sufficient justification for the omission complained of. Mr. Schumacher had to be examined *de bene esse* before the trial commenced and issues were raised, because he was leaving for Europe. At that time the respondent had no distinct intimation that the appellants were going to set up a case of purchase under the contracts on their own account. In the course of his cross-examination Mr. Schumacher set up that case for the first time; and the respondent has sworn that at that time he was at Calcutta and could not, therefore, give instructions to his counsel as to the new case unexpectedly set up. Under these circumstances we cannot eliminate from the case the evidence as to usage. It was open to the appellants to ask the learned Judge to postpone the hearing for the purpose of examining Mr. Schumacher by commission on the points as to trade usage.

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But even if we exclude all this evidence from our consideration and confine ourselves to the language of the written contracts, what is the result? The facts that the contracts were on c i f terms, that a rate of exchange was fixed by the agreement of the parties, and that two per cent was deducted from the price paid for the goods may be, as I have already observed, as consistent with the case of the appellants as with that of the respondent. And if that had been all the language of the contracts, we might have construed them in favour of the appellants. But it is, in my opinion, difficult to do that in face of the language of the paragraph in each of the contracts, which begins with the respondents granting "*to the buyers* the weights &c." and ends with the respondent agreeing to accept the appellants' or their agents' reports, decisions &c, as "correct and conclusive and binding upon" him. There is (in my opinion) here a studious distinction made between the appellants as parties to the contract and "the buyers." Had both the parties intended "the buyers" to be the same as the appellants, there was no need of distinguishing between the two. And this distinction becomes still more marked when we have the fact that one term of the contract imported into it by the incorporation of the contract form of the Oil Seeds Association (Ex C) was that it should be deemed to have been made in England or to be performed there, implying that the buyers were not here but were foreigners living abroad. It could not be said that the appellants were not here. They formed a trading firm carrying on business in Bombay by their constituted attorney, Mr. Schumacher. This conclusion is further strengthened by another fact. After the goods shipped by the respondent had arrived at their destination, the appellants wrote to the respondent that "buyers" complained bitterly of the quality of the shipments, (Ex T), implying that the buyers were people distinct from them (appellants). I agree, therefore, with Macleod J in the conclusion of fact at which he arrived in the case, holding that under the contracts in dispute the appellants had become agents of the respondent to sell his goods.

It is, however, urged before us that, assuming that an agency is established, the evidence on record proves beyond doubt that it was not, according to usage, an agency to sell and to account.

No doubt there is evidence to show that in the case of such contracts no accounts have been called for. The respondent had three previous dealings with the appellants in each of which the contract was of the same nature as the present. The first was settled by payment of differences, in the other two there was no accounting by the appellants and no inquiry by the respondent whether the goods had been sold by the former at the contract rate or for a lower or higher price than that. Similar dealings of the respondent with E. D. Sassoon & Co. and David Sassoon & Co. have hitherto ended without any account having been demanded or rendered.

But the respondent and his witnesses have given an explanation which to my mind is satisfactory, besides that it is not met by any evidence to contradict it. The explanation is that the contract in such cases is invariably made "against price offers"; the sale being in all cases at the rate fixed, there is no necessity for an account; but that there may be a case for accounts is contemplated by the terms of the contract itself. In each of the contracts in dispute the respondent agrees to accept as conclusive and binding upon him the appellants' or their agents' accounts.

The agency set up by the respondent being established, the next question is one of law. It is admitted that the goods shipped from here under the contracts were bought by the appellants themselves, and not sold to others for and on behalf of the respondent. Upon these facts Macleod J held that the appellants, having acted in breach of their agency, were not entitled to the charges to recover which the appellants had brought the suit. It is argued that, upon the facts found, the respondent can claim, according to section 216 of the Indian Contract Act, no more than that the appellants should, as agents, account for the profits they may have made from the transactions, but that the respondent cannot deprive them of the right to the charges incurred by them under the written contracts. Section 216 is merely enabling and confers upon a principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account

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of the latter The principal is free to exercise that right or not Mr. Jardine for the respondent relied, in support of Macleod J.'s decree dismissing the appellants' suit, on section 236 of the Indian Contract Act; but the learned Advocate-General urged that that section applied only to executory, not to executed, contracts. Section 236 can have no relevancy here on either construction of it. We have in the present case a dispute between a principal and his agent; section 236 contemplates a dispute between two persons, one of whom falsely professed as agent of a third party to deal with the other. It is section 215 of the Act which has a bearing on the case. It provides that—

“If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.”

The learned Advocate-General argues that where there has been no repudiation, that is, where the principal has, as in the present case, elected to affirm the purchase by the agent to himself, it is not open to the principal to retain the benefit of the purchase by pocketing the price he has already received and declining at the same time to bear the burden of the transaction, that is, to pay to the agent the sums which he has expended for the transaction and which the principal has under the contract rendered himself liable to pay.

Now, the law, no doubt, is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, “both approbate and reprobate.” But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

In the present case what is affirmed is the transaction of purchase by the agent on his own account. Whether the arbitration charges and allowances, which the appellants seek to recover from the respondent under the two contracts in suit, are incidents of and ancillary to that transaction or to the contract of agency is a question which must depend upon the construction

of those contracts. To my mind it is clear that those charges and allowances are annexed by the special agreement of the parties to the contract of agency as distinguished, in the written contracts, from the transaction of purchase. One part of the written contract is that the respondent as vendor accepts through the appellants (as his agents) the purchasers' offer to buy for the price specified in the contract. The other part is the term by which the respondent binds himself to his agents (the appellants) to pay to them the arbitration charges and allowances including short weight. The two parts are severable and contemplate two distinct liabilities. The fair inference, derivable from the words of the condition as to the charges and allowances in dispute and from the context in which it is introduced into each of the two written contracts in suit, is that it attaches to the agency, not to the purchase. The words are "with reference to this contract it is mutually arranged that no weighing or superintending charges should be charged but only arbitration charges and allowances (if any) and short weight (if any)." This mutual arrangement is between the respondent as principal and the appellants as his agents. This term has nothing to do with, but is independent of, the purchaser contemplated by the contract. If the agents substituted the character of purchaser for that of agent with reference to the goods, the condition disappeared with the latter, and no burden was left for the respondent to bear.

It cannot be fairly contended with reference to the two contracts in suit that the arbitration charges and allowances are not in the nature of remuneration for the agents' services but that they are expenses properly incurred for completing the sale and form part of the transaction of purchase affirmed by the principal. They might have been so if the written contracts had been silent; but here the parties have provided for the matter in express terms and imposed the burden as a condition of the principal's liability to his agents.

The reasons for that express agreement are not pure speculation. The arbitration had to be in a foreign country where the respondent could not personally be present to look after his own interests in the matter. Had he dealt with the buyers direct he

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would have said : " You are at the place of arbitration and can look after your own interests. I cannot. You must, therefore, agree to bear the burden of the charges and allowances." And probably the purchaser would have agreed. But rather than bargain in that way with the purchaser, the respondent let him off and bargained with the appellants as his agents and chose to bear the burden, because they were appointed and trusted to protect his interests at the place of arbitration. If the agents, notwithstanding that condition, of their own wrong converted themselves into principals and bought the goods on their own account, the transaction when affirmed must be construed as one in which, as between the vendors and the buyers, the latter had agreed to bear the burden of the charges and allowances. That is the legal aspect of the case presented by the proved facts and surrounding circumstances of the transaction.

This view of the law is supported by the authority of two decided cases, which I was able to find after we had heard arguments on appeal. In *Salomons v. Pender*⁽¹⁾, followed in *Andrews v. Ramsay & Co.*⁽²⁾, the question for decision was the right to commission of an agent, who, without his principal's consent and knowledge, had dealt with the business of the agency on his own account. But the principle, on which the decision in either case turned and the right in question was negatived, is broad enough to cover the present case. In *Salomons v. Pender*⁽¹⁾ Pollock C. B. said :—

"No authority has been adduced for a departure from the general principles governing such a case, and the argument has failed to convince me that a person can in the same transaction buy in the character of principal, and at the same time charge the seller as his agent. I cannot agree that, because the seller has chosen to abide by the sale, he is therefore to be held to have acknowledged the claims of the plaintiff both as agent and purchaser."

Bramwell B. said :—

"It is true that the plaintiff may have derived no material advantage from the interest which he has acquired in the premises ; and that the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say ' what you have done has been done as a volunteer and does not come within the line of your duties as agent '."

⁽¹⁾ (1865) 3 H. & C. 639.

⁽²⁾ [1903] 2 K. B. 635 at p. 637.

So also, Martin B.—

“*Mr. Bovill has contended, that as the sale was not rescinded there is a subsisting contract to pay the commission. But that seems to me to be a fallacy. The engagement to pay a commission to the plaintiff is quite distinct from the acceptance of an offer to buy the land.*”

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And then he cited Story on Agency: “In matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves”—a principle which is fully recognized in the Indian Contract Act.

The rule of law, then, is this. Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them. That is the principle, as I understand it, of the decisions in *Salomons v. Pender*⁽¹⁾ and *Andrews v. Ramsay & Co.*⁽²⁾. As that principle, in my opinion, governs the present case, the decree appealed from must be affirmed with costs.

HEATON, J.—The defendant in this suit sold 300 tons of cotton seed which were shipped by him on the S. S. Knight of the Thistle and sent to Hull.

The intermediary in the sale was Mr. Schumacher of the plaintiffs' firm Worman and Co. He settled the price with the defendant, obtained the bills of lading, paid the agreed price to the defendant, and caused the cotton seed to be delivered in Hull to buyers known to him but not to the defendant. The shipment of the three hundred tons though by one steamer, was in two

(1) (1865) 3 H. & C. 639.

(2) [1903] 2 K. B. 635 at p. 637.

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lots, of two hundred tons (3,200 bags) and hundred tons (1,600 bags) and the two lots were delivered to two different buyers. The arrangement between defendant and plaintiffs was embodied in two written agreements, signed by defendant which are set out at pp. 40 and 48 of the paper book, with counterparts signed by Worman and Co., which appear at pp. 128-129. One of the terms of the agreements was this :

"I/we guarantee to the buyers the weights, quality and sound condition at the port of delivery and I/we bind myself/ourselves to pay any claims for short weight or difference in quality or any other claim for any cause whatsoever, which the agents or buyers in Europe may bring against or on account of the goods or shipment immediately on demand, and I/we agree to accept your or your agents' reports, decisions, accounts, final invoices and/or other vouchers as correct and conclusive and binding upon me/us.

It happened that by the same steamer the defendant shipped about 6,000 more bags of cotton-seed (he says of the same quality as the 300 tons) to other unknown buyers in England through other firms in Bombay under agreements on the same general lines as those with Worman and Co.

The utmost deduction he was called on to pay for short weight and inferior quality in respect of these other bags of cotton seed was 2s. 6d. a ton. But Worman and Co informed him that in respect of the two shipments of 200 and 100 tons he had to pay at the rate 8s. 9d. and 6s. 9d. a ton respectively. These deductions were made under the rules of the London Incorporated Oil Seeds Association after weighment and sampling at Hull, the port of discharge, as provided in the contract. The extraordinary difference in the amount of the deductions payable, excited the attention of the defendant. He desired re-sampling in the case of the shipment of 300 tons. This was impossible. He appealed through Worman and Co. against the deductions: the appeal was fruitless. Then he declined to pay the charges claimed and in November 1907 Worman and Co. brought this suit to recover those charges from the defendant.

He resisted the claim at first on the ground that Worman and Co. as his agents had failed to carry out his instructions as to re-sampling and appealing. That ground, it should be mentioned, failed in the suit and was not sought to be made good in appeal.

In February 1908, Mr. Schumacher found that he had to go to Europe shortly and desired to expedite the suit. This the defendant was not prepared for but agreed that Mr. Schumacher should be examined *de bene esse*. This was done in February.

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The suit was heard in September. Mr. Schumacher had stated in his examination that the sale to him by defendant was an out and out sale and that he was not defendant's agent through whom the cotton seed was sold to unknown buyers. After this the defendant put in a supplemental written statement alleging in brief that Worman and Co. were his agents to sell ; that the sampling at Hull was made not under his contract with Worman and Co. but under other contracts between Worman and Co. and buyers in England, with which contracts defendant had no concern and under which he incurred no liability ; and that Worman and Co. were bound to account for all their dealings with the goods.

In the suit the controversy turned on two main points which, briefly put, amount to this—

- (1) Were the sampling and the appeal binding on the defendant ?
- (2) Were Worman and Co. agents to sell or buyers out and out ?

The first controversial point was decided against defendant ; the second in his favour.

Thereupon, this was the position. Under the contract between the plaintiffs and defendant the latter was bound to pay the deductions claimed. But the plaintiff had not acted under the contract, he had set it aside for he had bought for himself, not acted as a commission agent, and consequently could not claim under it. In the result, Macleod J. allowed the defendant to elect whether he would take a decree on the footing that defendant and plaintiffs were principal and agents or on the footing that plaintiffs were buyers out and out, had set aside the contract and could not claim under it. Defendant elected to take the latter course and the suit was dismissed.

The plaintiffs have appealed and the Hon. the Advocate-General who represented them stated fully, clearly and forcibly the argument for his clients and maintained that all the merits were on their side. He put it this way ; these deductions for short

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weight and inferior quality have to be paid by some one. All Worman and Co. can get is the price payable by the English buyers less the deductions. All defendant is entitled to, is the price agreed on less the deductions. But Worman and Co. have actually paid to the defendant the full price agreed on. How then in justice can defendant avoid paying the deductions? How can he justly retain the full price when the allowances which he agreed to pay have actually been paid by the plaintiff? So stated the case does appear to be very strong for the plaintiff. But as usual there is another side to it. Defendant (it is said on his behalf) dealt with Worman and Co. as commission agents. He trusted them as the business compelled him to do, to safeguard his interest. He was unaware of the identity of the buyers in England and could not reach them or protect himself in dealing with them except by the agency of Worman and Co.

When the weighing and sampling came to be made at Hull, it was all-important that they should be done in the presence of some one who would have a motive for safe-guarding defendant's interests. So long as Worman and Co. were agents acting in the interests of defendant they would employ agents at home who would make it their business to see that the weighing and sampling were fair to the defendant. But if Worman and Co. were buying on their own account they might ship to themselves (or their own agents) in Hull and then it would be to their interest to have the weighing and sampling done so as to bring about a large instead of a small deduction. For they themselves would pocket the whole of the deduction. This view of the case is of importance, not as suggesting dishonesty on the part of Worman and Co. but as showing that if defendant dealt with them as buyers he was running far greater commercial risks than if he dealt with them as commission agents.

Now Macleod J. has found that although the plaintiffs knew they were as a matter of fact buying on their own account, they held themselves out agents in the contracts they signed with the defendant.

If that be so, they induced defendant to believe he was running no more than ordinary commercial risks, whereas in reality he was

running risks of a much more serious nature and was placing them in a position in which they could benefit by his loss.

If it be so, justice does not require that they should be protected against loss due to their own action in order that defendant may not take an unforeseen profit. They could apparently have obtained from defendant deductions at 2 s. 6 d. a ton; defendant was apparently ready to pay that for he deposited it in Court but they preferred to take the chance of getting more. It is not for them to complain because in taking that chance they incurred the risk of getting nothing.

In this case the merits are not unquestionably all on one side but depend on the facts found.

The real crucial question is that on which Macleod J. has recorded an unambiguous finding. Did the plaintiffs induce the defendant to enter into contracts in the belief that they were to be commission agents?

The actual form of the contract has been keenly and exhaustively discussed. The result of the discussion is to demonstrate that it is in a form which suggests that Worman and Co. were commission agents and not buyers. It is unnecessary to embark on a detailed examination of the arguments one way or the other; it is enough to say that the relations between the parties were complex; one party took some risks, the other party took other risks; but nevertheless according to the form of the contract, the plaintiffs were to sell the cotton seed on behalf of defendant and not to buy it themselves. There are however two arguments which need comment. The Hon. the Advocate-General urged that defendant himself had admitted that plaintiffs were buyers and that the terms of the contract were such that plaintiffs stood to lose if they got nothing but the 2 p. c. commission or discount provided for in the contract.

It is quite true that defendant has spoken and written of plaintiffs as buyers from him. But this does not of itself indicate that defendant ever believed they were buyers only; and not his agents selling on commission. They were buyers in the sense that they represented purchasers in England and were the only persons with whom defendant would deal in arranging his

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relations with the real buyers. Therefore, once the agreements were signed and the goods shipped, Worman and Co. would be of more immediate and practical importance to him as agents of the buyers in England than as his agents to sell. It was after this stage had been reached that defendant termed them buyers. It is not surprising then, that he did speak of them as buyers; unless we assume that he would carefully discriminate between the two capacities in which they stood to him, namely, as agents to sell on his behalf and as buyers on behalf of clients in England. Such nice discrimination is not to be expected and its absence does not and need not excite the belief that defendant knew the plaintiffs were out and out buyers.

The second argument is made out in this way, plaintiffs were to get 2 p. c. on the price defendant paid, but they had to pay about $\frac{3}{4}$ p. c. as weighing and superintending charges in Hull and $2\frac{1}{2}$ p. c. discount to the buyers there. So unless they could make a profit by getting a better price in England they must inevitably lose; therefore, it must have been intended that they were to get a better price if they could: and it follows that they bought to make a profit for themselves and were buyers out and out and not agents to sell. The argument is neat but unconvincing. The price entered in the agreement between plaintiff and defendant would not be identical with the price arranged with the buyers in England. The latter price would naturally allow for the discount of $2\frac{1}{2}$ p. c. if not for the charge of about $\frac{3}{4}$ p. c. We have the evidence of Mr. Powell of Messrs. David Sassoon and Co. to show that it is so and it naturally would be. In the nature of things, commission agreements need not state both the price at which the principal sells and that at which his agent sells. It may be implied that the price at which the agent sells is to cover discount and other charges and still leave him his clear commission. It is not necessary to express this, and what evidence there is on the point indicates that it is usually implied and not expressed. It does not, therefore, appear that the contracts were in a form so different from ordinary contracts made with commission agents as to suggest a sale out and out. The Hon. the Advocate-General also urged, it seems to me quite correctly, that the right way to deal with this

case, is to ascertain from the contract and the evidence what really were the relations between the parties; not to give the contract a name and from that name infer the relations. He urges that the crucial test is whether the plaintiffs were bound to account to the defendant and argues that they were not because the defendant did not call for an account either in this matter or in the previous dealings between the parties; and because the evidence shows that in apparently similar dealings between defendant and other parties accounts were not called for. All this is true; but the fact that in practice accounts are not called for, does not prove that there is not a liability to account. It is an indication which properly may be used as an argument in plaintiffs' favour. But is it a cogent argument or one of only slight value? I think, in this case it is the latter. In these, as in other mercantile dealings, there is necessarily a good deal of give and take and much mutual confidence. To enforce the liability to account as a practice, would impair the mutual confidence and create friction, where smooth working is essential. Hence, it is easy to understand that though the liability to account is there, it would not be enforced so long as the parties had confidence in, and desired to continue to deal with each other. This consideration, it seems to me, destroys the force of the Hon. the Advocate-General's argument. That a liability to account was contemplated is, I think, clear from the words in the contract. "We agree to accept your or your agents' reports, decisions, *accounts*, &c., as conclusive and binding upon us."

Having considered these general arguments I come back to the real question whether the plaintiffs induced the defendant to enter into the contracts in the belief that they were commission agents. I have shown that the form of contract indicates that plaintiffs were to be commission agents. The actual course of dealing indicates the same, for, as has been explained, on any other hypothesis, the defendant was running greater mercantile risks than it is reasonable to suppose, he would be likely to undertake. The evidence of Messrs. Powell, Jivaraj Tokersey, F. D. Lalkaka and Thomas, who show that Messrs. David Sassoon and Co., E. D. Sassoon & Co. and

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Graham & Co. in similar dealings do act as commission agents and nothing else, supports this conclusion. The cumulative effect of these considerations tends clearly and definitely to the finding that plaintiffs would appear to the defendant to be commission agents. The plaintiffs could not fail to know this. It follows that they knowingly entered into contracts which could not bear any interpretation but that they were commission agents. What is there on the other side? Putting aside the general arguments, the most important of which have been discussed, there is the evidence of Mr. Schumacher which states that Worman and Co bought out and out on their own account and did not act as agents in the transaction; that the 2 per cent. was trade discount and not commission; and implies that he did nothing to lead defendant to suppose Worman and Co. were acting as agents. There is also the evidence of the broker Pranshankar which is indefinite and does not, in my opinion, elucidate the matter at all. It is perfectly true that when Mr. Schumacher was examined the crucial points in the case were not so clearly understood as later, when the suit came on for trial; and that he was not questioned as to certain matters to which Meghji, the defendant, deposed; especially matters bearing on this question as to whether Mr. Schumacher led defendant to believe that the former was merely an agent to sell. Hence it is argued that either the defendant should not have been questioned on these points or that when defendant's case was closed the plaintiffs should have been allowed to adduce rebutting evidence. In my opinion, this argument cannot prevail. The issues indicated clearly enough what was in dispute. If matters came out in the evidence which plaintiffs had not foreseen, that was an ordinary incident of a trial. These matters were pertinent to the issues, they were an important support, not of a new case set up by defendant after the plaintiff's case was closed, but of defendant's case, as indicated in the second written statement and crystallized in the issues. Therefore, I do not think, plaintiffs were entitled to give rebutting evidence or that Macleod J. was wrong in refusing to allow it.

It only remains to add a few words as to Mr. Schumacher's evidence. Macleod J. who tried the case came to the conclusion

that, whether consciously or not, Mr. Schumacher did obtain the contracts on the representation (whether by precise unqualified words or not does not matter) that he was to act as commission agent. He does himself admit he did not tell the defendant he was buying out and out (page 31 of the Paper Book): this admission taken with the words of the contract, the course of dealing between the parties, and the course of dealing deposed to in similar transactions, convinces me that Macleod J. was right. That being so, the plaintiffs cannot claim under the contract, for they themselves set it aside. As purchasers out and out, the plaintiffs were themselves bound to accept, from the buyers in England, the price diminished by the amount of deductions there made. On what footing can they recover these deductions from the defendant? Not under the contracts, for these they themselves destroyed. If at all it is only, so far as I can see, by way of damages. But damages are neither claimed nor proved in the case. That they were not claimed, is clear from the course of the litigation. They are not proved, because the only evidence of them consists of reports and correspondence which would be conclusive, if the contracts could be appealed to, but which otherwise do not by themselves amount to satisfactory proof even if they are evidence at all.

Finally, the plaintiffs claim that they should be allowed to render an account; but that would be to assume that in fact they were agents, which they were not. They were in fact buyers out and out and went to trial and had issues framed on that assertion. They cannot now be allowed to rectify unforeseen losses by assuming the position of agents. The judgments in *Andrews v. Ramsay & Co.* ⁽¹⁾ explain the principle on which the decree made by Macleod J. was proper. Therefore, I think, that decree should be confirmed and this appeal be dismissed with costs.

Decree confirmed.

Attorneys for the appellants: *Messrs. Binnell, Merwanji and Romer.*

Attorneys for the respondent: *Messrs. Kanga and Patel.*

B. N. L.

(1) [1903] 2 K. B. 635.

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CRIMINAL REVISION.

1909,
November 25.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

IN RE SHIVLAL PADMA.*

Criminal Procedure Code (Act V of 1898), section 195—Sanction to prosecute—Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882), sections 37, 38.

Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, a Full Court of that Court has no power to revoke the sanction.

Per CHANDAVARKAR, J. —The language used in sections 37 and 38 of the Presidency Court of Small Causes Act (XV of 1882) does not appear to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court.

Per BATCHELOR, J. —The jurisdiction conferred by section 38 of the Act is not appellate, but revisional only.

THIS was an application under the criminal revisional jurisdiction of the High Court.

The fifth Judge of the Bombay Presidency Small Causes Court granted a sanction to prosecute the applicant Shivilal Padma for offences punishable under sections 191, 193, 196, 463 and 465 of the Indian Penal Code.

The applicant applied to the Full Court of the Court of Small Causes at Bombay, but that Court declined to interfere on the ground that it had no jurisdiction.

The applicant applied to the High Court.

S. R. Dadybujor, for the applicant.—The only point is whether the full Court of the Bombay Court of Small Causes can revoke the sanction granted by the fifth Judge. The power of one Court to revoke the sanction granted by another Court is given by section 195 of the Criminal Procedure Code. Under section 195 (6) "any sanction given or refused.....may be revoked or granted by any authority to which the authority...is subordinate." Clause 7 further defines the subordination. "Every

* Criminal Application for Revision No. 284 of 1909.

Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie."

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We have thus to see whether the Court of the fifth Judge is subordinate to the Full Court within the meaning of section 195 (6) and (7) that is, whether an appeal ordinarily lies from the Court of the fifth Judge to the full Court. The powers of the Full Court are defined by section 33 of the Presidency Small Cause Courts Act (XV of 1882) and we have to see whether in view of these powers, it could be called an Appellate Court.

The word appeal has nowhere been defined either in the Civil or Criminal Procedure Codes.

Wharton's Law Lexicon (8th Edn.) gives the definition of appeal as "the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the inferior Court." Century Dictionary defines the word as "in law, to refer to a superior Judge or Court for the decision of a cause depending; specifically to refer a decision of a lower Court or Judge to a higher one for re-examination or reversal." The definition in Webster's Dictionary is in terms similar to the one in Wharton's.

It follows from these definitions of appeal that any Court, which could examine and test the soundness of the decision of another Court on any point, either of law or fact, is a Court of appeal to the other.

The Full Court satisfies all these conditions. It can, under section 33, alter, set aside or reverse any order or decree, passed by the fifth Judge. No Appellate Court could have powers wider than these. The Full Court consists of two Judges, viz., the Chief Judge and the Judge whose decisions are under consideration. Its powers are given in a chapter which is headed "New Trials and Appeals." The constitution of this Court, as well as its powers, were fully considered in *Behram v. Ardeshir*⁽¹⁾. It is not necessary that an appeal should lie from one Court to another in *all* cases. If in some cases it lies, that is sufficient for section 195 of the Criminal Procedure Code: *Maduray Pillay*

(1) (1903) 27 Bom. 563; 5 Bom. L. R. 910.

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v. *Elderton*⁽¹⁾. The word "ordinarily" is specially used in the section to obviate this difficulty. Therefore it does not matter if an appeal does not lie in *ex parte* cases.

R. R. Desai, for the respondent :—The word appeal does not appear anywhere in the section. I rely on the case of *In re Goverdhandas*⁽²⁾ to show that the Full Court has no power to revoke a sanction granted.

Moreover the Full Court and the Court of the fifth Judge cannot be considered as two distinct Courts. No such distinction is made in the whole Act. The use of the word "appeal" in the heading of the chapter is not justified by what follows in the chapter itself.

CHANDAVARKAR, J. :—The question, in this case, is whether a Full Court of the Presidency Small Causes Court in Bombay has power to grant or revoke a sanction refused or granted by a single Judge of that Court. The determination of that question depends upon the further question whether the Full Court is a Court of appeal, or whether, if it is not a Court of appeal, it is a Court of ordinary original jurisdiction within the meaning of clause 7 of section 195 of the Criminal Procedure Code. As regards the Full Court, it ought to be borne in mind that there is no mention of or provision for it in the Presidency Small Cause Courts Act. This has been pointed out in a decision of this Court in *Behram v. Ardesheer* ⁽³⁾. As held there, it is a Court which has obtained its legality and status owing to a long continued practice. And there it was also held that, though no rules had been framed as to the exercise by the Full Court of any powers under the Act, it did not follow that the sittings of that Court were *ultra vires*. It is the long practice which has given it its validity. But that decision left the question untouched as to whether the jurisdiction exercised by the Full Court was of an appellate or revisional character. Its determination depends on the construction of sections 37 and 38 of the Presidency Small Cause Courts Act, XV of 1882. Now, these sections occur under Chapter VI of the Act. That chapter is

⁽¹⁾ (1895) 22 Cal. 487.

⁽²⁾ (1902) 27 Bom. 130.

⁽³⁾ (1903) 27 Bom. 563 ; 5 Bom. L. R. 555.

headed "New Trials and Appeals." No doubt the heading of a chapter is a key to the construction of the enactment, as has been pointed out by Lord Macnaghten in his judgment in *Arrow Shipping Company v. Tyne Improvement Commissioners* ⁽¹⁾. But it is a key, only where the main provisions of the sections which occur under that heading or chapter are ambiguously worded. Here it is clear that the words of the heading of the chapter mean no more than that the chapter deals with the question of new trials and appeals. That does not mean that an appeal is allowed but it means that the chapter concerns the question. How that question is solved must be decided on the provisions of the sections of the Chapter. Section 37 says:—"Save as otherwise provided by this Chapter or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive." That means that ordinarily a decree of a Presidency Small Causes Court is not appealable. Then section 38 goes on to provide that, "the Small Cause Court may...order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable." Does this language amount to an appellate jurisdiction conferred upon the Full Court? This is an Act of the Legislature of the Government of India, and in construing these sections, we may well call in aid the language used by the same Legislature in other Acts as to the right of appeal. For instance, in the Civil Procedure Code and in the Criminal Procedure Code, in conferring an appellate jurisdiction upon a Court apt language has been used, the words used being "an appeal shall lie." Here the provisions of the section do not use the word "appeal" at all. And that view, I think, is further strengthened by this circumstance, that where a right of appeal is given to a party, it means from a lower to a higher Court. For instance in the High Court, where there is a judgment by a single Judge, sitting as a Court, there is an appeal under the Letters Patent to a Court consisting of two Judges.

But here the Act makes no distinction between a Judge and more than one Judge of the Presidency Small Causes Court.

(1) [1891] A. C. 503 at p. 530.

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What is spoken of is the Small Causes Court, whether it consists of one Judge or more than one Judge. And the jurisdiction here conferred is not necessarily upon a Bench consisting of more than one Judge. Therefore, the language used in the sections does not appear to me to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court. It is all the more necessary to arrive at that conclusion, having regard to the decision of *Behram v. Ardesbir* ⁽¹⁾ which says that the Full Court is merely a creature of practice. There is no provision for it in the Presidency Small Causes Courts Act. Therefore, we should not extend its powers beyond those which have been recognised up to now unless there is anything express in the Act, which justifies the extension of these powers.

For these reasons, I am of opinion that the Full Court was right in holding that it had no jurisdiction to interfere with the sanction granted by the fifth Judge of the Small Causes Court. This application is rejected and the rule discharged.

BATCHELOR, J.—I am of the same opinion. I think that in order that Mr Dadyburjor should succeed in his application, it is necessary for him to show that under the Presidency Small Cause Courts Act, XV of 1882, appeals ordinarily lie from the decision of a single Judge to the Full Court. (See section 195 of the Criminal Procedure Code.) That is a proposition which, in my opinion, it is impossible to maintain. The question turns upon the meaning of section 38 of the Presidency Small Cause Courts Act, and I have no hesitation in thinking that the jurisdiction conferred by that section is not appellate, but revisional only. The words used are apt for the purpose of expressing the grant of revisional jurisdiction and they are very inapt for the other purpose. No right is conferred upon the defeated litigant, but a power is conferred upon the Court, and it is noteworthy that the Court concerned is the same Court—the Small Cause Court—with which other sections of the Act deal.

Moreover if Mr. Dadyburjor's argument were right, then the result of section 38 would be this: that in case of every single

(1) (1903) 27 Bom. 503, 5 Bom. L. R. 555.

decree passed in a contested suit there would be a right of appeal. That view is, I think, opposed both to the general scheme of this Act and to the language of section 37, which must be read together with section 38. For these reasons, I agree with my learned colleague in thinking that this application should be refused.

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Rule discharged.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

RAVJI VALAD MAHADU PATIL (ORIGINAL DEFENDANT), APPELLANT,
v. SAKUJI VALAD KALOJI AND ANOTHER (ORIGINAL PLAINTIFFS),
RESPONDENTS *

Hindu Law—Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), Art. 120.

Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs.

The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir.

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, confirming the decree of G. L. Dhekne, Subordinate Judge of Kopargaon.

The plaintiffs, who were cousins, sued for a declaration that they, and not the defendant, were the heirs to the Patilki Vatan of their paternal uncle Ganpati Hari, deceased, or of Reubai, the widow of the deceased. The plaint alleged that Ganpati died about thirteen years before the suit, that the defendant fraudulently represented himself to be the heir of Ganpati and got

* Second Appeal No. 475 of 1909.

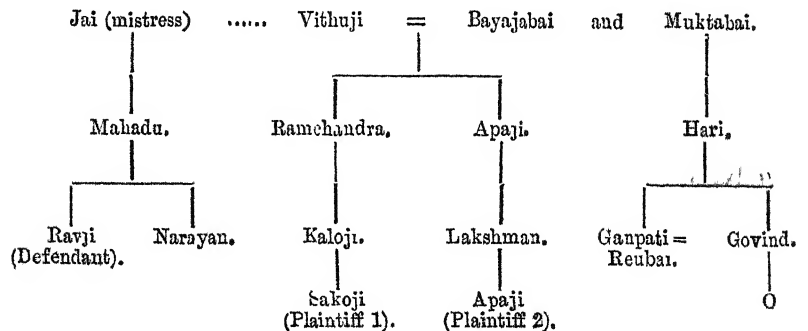
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his name entered as such in the Vatan Register in the year 1899 though Ganpati had left him surviving his widow Reubai, that the defendant was *Dasiputra* (illegitimate son) in the plaintiffs' family and was, therefore, not entitled to the vatan, that Reubai died in or about the year 1902 in the Baroda territory where she lived, and that the plaintiffs having learnt of the defendant's fraud in October 1905, they brought the present suit in the year 1906 for a declaration of their heirship.

The defendant answered that he was not a *Dasiputra*, that he was the son of Mahadu, the natural brother of Hari the father of Ganpati, that he was thus a nearer heir to Ganpati than either of the plaintiffs and that the suit was time-barred.

The following is the genealogical tree :—



The Subordinate Judge found that the plaintiffs were the heirs of the deceased Ganpati, that the defendant was the son of Mahadu who himself was a *Dasiputra* of the plaintiffs' ancestor Vithuji and was not the heir of Ganpati, that the defendant acted fraudulently in getting his own name entered as heir in the Vatan Register, and that the plaintiffs having learnt of the defendant's fraud about four years before the suit, the claim was not time-barred under Article 120 of the Limitation Act. The Subordinate Judge, therefore, decreed the claim, observing :—

The evidence shows that plaintiffs are the heirs of Ganpati and that the defendant is not shown to be born of their ancestor Vithuji. Even for the sake of argument if it be held that Mahadu was born of the mistress of Vithuji, still it can't be held that Mahadu's son Ravji is a preferential heir to the plaintiffs. There is no exact decided case to guide me. Referring to the cases under the

heading of "Illegitimate sons" on pp. 3488 to 3494 of Woodman's Digest, I think the case of I. L. R. 21 All. 99 goes against the defendant even if it be conceded that the defendant's father was a *Dasiputra*. As regards vatan property the sentiment of the Hindus even of the Sudra class would be that it should go to the legitimate heirs rather than to the descendants of the illegitimate heirs. The cases referred to above are most of them cases of inheritance by an illegitimate son to his father. There are few cases of collateral succession and the few that are cited are against the defendant. I think that sentiment and opinion even amongst the Sudras would be to give the plaintiffs a preference as against the defendant and especially so when vatan property is concerned. I therefore declare that plaintiffs are the heirs to the vatan share of Ganpati Hari and they are the reversionary heirs to Ganpati Hari now after the death of Ganpati's widow Reubai as regards the property in dispute. * * * I declare that the defendant is not the heir as claimed by him. All costs on the defendant.

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On appeal by the defendant the District Judge confirmed the decree. With respect to the defendant's illegitimacy he agreed with the Subordinate Judge, and on the point of limitation he made the following remarks :—

The only remaining question is that of limitation. The suit clearly falls under Article 120 of the Limitation Act, of I. L. R. 15 Bom. 422, and the question is, when did the right to sue accrue to the plaintiffs? As to this I agree with the lower Court that it did not accrue till Reubai's death, which was within six years of the institution of the suit. No doubt plaintiffs were adversely affected by the entry of defendant's name in place of Ganpati's in the vatan Register in 1899, but this in itself gave them no right to sue for the relief claimed in the present suit, *viz*, that they were entitled to have their names entered in the register as heirs of Ganpati in preference to the defendant, because the latter in such a suit could at once have pleaded that even on plaintiffs' case they had no right to such a declaration so long as Reubai was alive. And if, as appears from one of the documents tendered in evidence in this appeal and as is not unlikely from the fact that Reubai lived in Baroda, except for 7 years or so after her husband's death when defendant says she lived with him, Reubai was a consenting party to the defendant's name being entered in the register, it virtually amounted to an alienation of her share of the vatan by Reubai, which would, under section 5 of Bombay Act III of 1874, be valid during her life-time. And the mere fact that plaintiffs could have brought a suit to declare such alienation valid (invalid?) (illustration (e) to section 42, Specific Relief Act) does not bar a suit like the present, after the plaintiffs have obtained a vested interest in the property in regard to which they seek a declaration. The "right to sue" is a different one and arises out of a different cause of action.

The defendant preferred a second appeal.

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R. R. Desai for the appellant (defendant) :—The plaintiffs sued for the declaration of their status as Vatandars. Civil Courts have no jurisdiction to entertain such a suit.

[Scott, C. J. :—It has been recently held that such a suit can be entertained by Civil Courts: *Rahimkhan v. Dadamiya*⁽¹⁾.]

Our next point is that we are entitled to inherit the vatan though it has been found that our descent was illegitimate in a collateral branch of the family. The parties are Sudras, and under Hindu Law the illegitimate son of a Sudra has the rights of a legitimate son in the family of his father and his share in the family property is half of what a legitimate son is entitled to, and in the absence of a legitimate son he takes the whole of his father's property. The decision in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*⁽²⁾ is no doubt against our contention, but we submit that it is not conclusive on the point. There is nothing in Hindu Law to exclude illegitimate sons among Sudras from succeeding to collaterals: West and Bühler (3rd edn.), pp. 72, 81, 83, 461, 462; Macnaghten's Hindu Law (3rd edn.), pp. 14, 15. The ruling in *Ramalinga Muppan v. Pavadai Goundan*⁽³⁾ shows that the sons of an illegitimate son are entitled to succeed to their grandfather. The principle of survivorship is also held to apply by the Privy Council in the case of illegitimate sons surviving the legitimate sons: *Jogendro Bhupati v. Nityanand Man Sing*⁽⁴⁾. If that is so, then there is no reason why an illegitimate son should not succeed to the collaterals of his father.

The next point is that the suit is time-barred. Our name was entered in the Vatan Register as next heir after due inquiry under the Vatan Act in the year 1899, while the present suit was filed in the year 1906, that is, more than six years after the entry. It is true that Reubai died in 1902. But the cause of action accrued to the plaintiffs on the date our name was entered in the Vatan Register as the next heir. Such a suit is governed by Article 120 of the Limitation Act: *Chhaganram Astikram v. Bai Motigavre*⁽⁵⁾; *Ramaswami Naik v. Thayammal*⁽⁶⁾.

⁽¹⁾ *ante* p. 101.

⁽²⁾ (1898) 21 All. 99.

⁽³⁾ (1901) 25 Mad. 519.

⁽⁴⁾ (1890) 18 Cal 151.

⁽⁵⁾ (1890) 14 Bom. 512.

⁽⁶⁾ (1902) 26 Mad. 488.

V. M. Mone for the respondents (plaintiffs) :—The question as to the inheritance of illegitimate sons is clearly covered by the rulings in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*⁽¹⁾ and *Nissar Murtojah v. Kowar Dhunwunt Roy*⁽²⁾. The cases cited and the passages relied on from West and Bühler do not support the defendant's contention.

As to the point of limitation, our claim is not time-barred. So long as Reubai was alive she was entitled to inherit the vatan as the widow of the last male-holder. Our cause of action accrued on her death. She died in the year 1902 and the present suit was filed in the year 1906, that is, within six years after her death; therefore, under Article 120 of the Limitation Act the suit is not beyond time.

Desai in reply.

SCOTT, C. J. :—In this case two points have been argued. First, that the suit is barred by limitation, and, secondly, that the defendant was entitled as an heir of Vithoji in preference to the plaintiffs. This latter point does not appear to have been argued in the District Court possibly because it was thought to be a hopeless point. The authorities are all against the defendant's contention, dating from the case of *Nissar Murtojah v. Kowar Dhunwunt Roy*⁽²⁾ up to that of *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*⁽¹⁾, and *Ramalinga Muppan v. Pavadai Goundan*⁽³⁾. The contention is also opposed to the opinion expressed by the learned authors of West and Bühler's Hindu Law at page 83 (3rd edn.). There is no caste custom proved in this case to support the defendant's contention (see also *Mitakshara*, chap. I, section 11, placitum 31).

With regard to the point of limitation we agree with the view taken by the learned District Judge. The plaintiffs' right to sue for a declaration would not accrue until the death of Reubai, whose existence at any time between the death of Ganpati and her own death would have defeated the suit for a declaration by

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(1) (1898) 21 All. 99.

(2) (1863) 1 Marsh. 609.

(3) (1901) 25 Mad. 519.

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the plaintiffs, on the ground that she had vested right as the nearest heir of the last vatandar.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

CRIMINAL REFERENCE.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1909.

EMPEROR v. ARJUN AMBO KATHODI.*

December 2.

Criminal Procedure Code (Act V of 1898), sections 109, 123, 397—Penal Code (Act XLV of 1860), section 329—Concurrent sentences—Consecutive sentences.

The accused was proceeded against under section 109 of the Criminal Procedure Code, and sentenced on the 6th July 1909, under section 123 of the Code, to rigorous imprisonment for nine months, in default of security for good behaviour. He was then tried for an offence of theft committed by him in November 1908, and was, on the 17th August 1909, sentenced to suffer rigorous imprisonment for three months. The second sentence was directed to take effect on the expiry of the first sentence.

Held, that the two sentences ought not to run consecutively, but must run concurrently.

REFERENCE made by J. L. Rieu, District Magistrate of Thána.

Arjun Ambo Kathodi was proceeded against under section 109 of the Criminal Procedure Code before the Honorary Magistrate First Class, Thána, who, in default of his giving the security demanded, sentenced him under section 123 of the Code to undergo rigorous imprisonment for nine months. This order was passed on the 6th July 1909.

Arjun was subsequently prosecuted in the Court of the First Class Magistrate, Sálsette, for an offence of theft committed by him in November 1908, and convicted and sentenced to suffer rigorous imprisonment for three months on the 17th August 1909

* Criminal Reference No. 100 of 1909.

with a direction that the sentence should take effect on the expiry of the term of imprisonment ordered in the former case.

The District Magistrate of Thána, being of opinion that the direction was not permissible in law, referred the case to the High Court, observing :—

“In view of the decision of their Lordships delivered in *Emperor v. Muthukomaran* (I. L. R. 27 Madras 525), both the sentences ought to run concurrently.”

The reference was considered by their Lordships.

PER CURIAM :—We must accept the District Magistrate's view in this Reference which is in accordance with the ruling of this Court in *Queen-Empress v. Tulshya Bahiru*⁽¹⁾, with *Emperor v. Muthukomaran*⁽²⁾ and *Joghi Kannigan v. Emperor*⁽³⁾.

We must, therefore, make the sentences concurrent in the present case.

R. R.

(1) (1898) Unrep. Cr. C. 970.

(2) (1903) 27 Mad. 525.

(3) (1908) 31 Mad. 515.

APPELLATE CRIMINAL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

*IN RE DHONDO KASHINATH PHADKE.**

*Newspaper (Incitements to Offences) Act (VII of 1908), section 3—
Order—Forfeiture of press.*

1909.

December 22.

Section 3 of the Newspaper (Incitements to Offences) Act, 1908, provides for the making of a conditional order declaring the printing press used for the purpose of printing or publishing the offending newspaper to be forfeited. The section refers to the whole of the press : and no order could be made under it limited only to such portions of the press as were employed in printing the offending newspaper.

APPEAL from an order passed by J. L. Rieu, District Magistrate of Thána.

* Criminal Appeal No. 405 of 1909.

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IN RE
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Dhondo was the owner of a printing press called the Arunodaya Press at Thána.

A weekly newspaper called the "Hindu Panch" was printed at the aforesaid press. Some of the issues of the newspaper contained articles which fell within the purview of the Newspaper (Incitements to Offences) Act, 1908.

Under section 3 of the Newspaper (Incitements to Offences) Act, 1908, the District Magistrate of Thána, on the 6th October 1909, passed a conditional order for the forfeiture of the whole of the Arunodaya Press; and he made the order absolute on the 18th idem.

In making the order absolute the Magistrate remarked as follows :—

"The respondent Dhondo Kashinath Phadke has presented an application in which he states that only one machine and two frames of type are used or can be used for printing the 'Hindu Panch' and prays that the order may be made in respect of these particular portions of his printing press only. I do not see how it is practicable to discriminate between particular portions of a press. It may be that the other portions of the press could not be used for printing the paper without introducing certain modifications in its size and appearance, but this would not be a bar to its production by the press which is the object of this preventive measure. I cannot therefore entertain the application. The order of forfeiture will extend to the whole of the printing plant and materials of the 'Arunodaya Press' by which the 'Hindu Panch' has been declared by its publisher under the Press and Registration of Books Act, 1867, to be printed and to all copies of that newspaper, wherever found."

The applicant applied to the High Court contending, *inter alia*, that the Magistrate erred in making the order applicable to the whole printing plant and materials of the Arunodaya Press, but ought to have ordered the forfeiture of the printing press used for the purpose of printing or publishing the said papers only.

D. A. Tulzapurkar, for the applicant.

M. B. Chaudal, Government Pleader, for the Crown.

PER CURIAM :—This is an application by the petitioner Dhondo Kashinath Phadke by way of appeal against the order of the District Magistrate of Thána forfeiting the Arunodaya Press.

The argument advanced before us is that the Magistrate should have limited his order to the forfeiture of such portions of the

Arunodaya Press as were used for the printing of the "Hindu Panch" and should not have passed an order of forfeiture of the whole press.

It is to be observed, however, that section 3 of the Newspaper (Incitements to Offences) Act, VII of 1908, provides for the making of a conditional order declaring the printing press used for the purpose of printing or publishing such a newspaper to be forfeited, and clause (c) of section 2 defines printing press to include all engines, machinery, types, lithographic stones, implements, utensils and other plant or materials used for the purpose of printing.

As the paper was printed at the Arunodaya Press, the Magistrate was right in forfeiting the whole press as defined by the Act.

We, therefore, dismiss the appeal.

Appeal dismissed.
R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

TRIMBAK RAMCHANDRA PANDIT AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. SHEKH GULAM ZILANI WAIKER (ORIGINAL PLAINTIFF), RESPONDENT.*

1909.
December 8.

Saranjam—Inam—Miras (permanent tenancy)—Denial of Saranjamdar's title—Attornment to successive Saranjamdars—Estoppel—Claim to hold as Mirasi tenant—Limited interest—Adverse possession.

In an ejectment suit brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a Saranjam held on political tenure and that the present incumbent of the Saranjam was the plaintiff. The defendants resisted the plaintiff's claim to eject them on the ground that the Inam rights were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, had descended to his heirs independently of the Inam and furnished the leasehold or Mirasi right.

* Second Appeal No. 537 of 1907.

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Held, that the defendants' contention involved the denial of the title to the reversionary rights in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title.

Vasudev Daji v. Babaji Ranu⁽¹⁾ and *Doe dem. Marlow v. Wiggins*⁽²⁾, referred to.

The rights of successive holders of hereditary and impartible estates not governed by the ordinary rules of inheritance but subject to the condition that Government shall approve of the heir may be barred by adverse possession.

Tekait Ram Chunder Singh v. Srimati Madho Kumari ⁽³⁾, referred to.

Where in an ejectment suit by an Inamdar it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants,

Held, that the defendants had acquired a title to the limited interest claimed by them and could not be ejected.

SECOND appeal from the decision of D. G. Gharpure, First Class Subordinate Judge of Satara with appellate powers, confirming the decree of G. N. Sathe, Subordinate Judge of Wai.

Suit in ejectment brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants.

The facts of the case were as follows:—

The plaintiff's family held several Saranjams, Inams and other properties situate in the Poona, Satara, Khandesh and Belgaum districts. The land in dispute, known as the Wai Saranjam, is situate at Wai in the Satara District. In the year 1716 the plaintiff's ancestor Shekh Mira I, who was in the service of Satara Government, made a representation to Shahu Chhatrapati who granted to him a Sanad (Exhibit 94) as follows:—

Peace. Prosperity. In the coronation year 42 (A. D. 1716) the name of the cyclical year being Manmath, the lunar date the 5th of Shravan Bahul (dark half)—Monday. The illustrious King Shahu Ohhatrapati (*i e.*, the lord of the umbrella) Swami—the ornament of the warrior race, issued an order to Bajirao Annaji Janardan, Deshadhikaris and Lekhaks (writers), present and

⁽¹⁾ (1871) 8 Bom. H. C. R., A. C. J., 175.

⁽²⁾ (1843) 4 Q. B. 367.

⁽³⁾ (1885) L. R., 12 I. A. 197.

future of Prant Vai as follows :—Ajam Shekh Mira walad Bava Khan, an inhabitant of Kasba Vai, made a representation before the Swami (*i.e.*, the King) at Fort Satara (stating) “I have rendered a great deal of service with a singleness of purpose in the kingdom of the Swami. As to that, there is my old *Katban** Thikan—being land cultivated by irrigation, measuring Bighas ... situated at Kasba Vai, which the Swami should be pleased to grant me in Inam.” He made a representation to this effect. The Swami thereupon taking (the representation) into consideration and (considering) that he is a devoted servant of the Swami, is graciously pleased to grant in Inam the old *Katban** Thikan, being land cultivated by irrigation, measuring $6\frac{1}{2}$ Bighas, six and a half Bighas—together with all taxes and cesses (but) exclusive of the Hakdars (dues) to him and to his sons, grandsons, etc., from generation to generation. You are therefore to fix the said land (so as) to measure six and a half Bighas—twenty Pands going to make one Bigha—and mark off the four boundaries thereof and continue the (same as) Inam. You are not to insist upon the production of refresh letter (of grant) and deliver the original letter to the person aforesaid for his enjoyment. Note this.

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Subsequently in the year 1848 Shekh Khan Mahomed, a descendant of Shekh Mira I, granted in Miras (perpetual tenancy) the land in dispute to Baburav Raghunath Pandit, an ancestor of the defendants. The Miraspatra (Exhibit 84) was as follows :—

To Bhai Baburao Raghunath Pandit, may your affection endure from your sincere friend Amir Hussain *alias* Shekh Khan Mahomed Baba Saheb of Wai Inami Jahagirdar. Greetings—In this Kasba there is my Inami land. The same called *Katban* measuring Bighas 4 and (the right to take) water for a Prahar (*i.e.*, three hours) have been with your father on a lease of cultivation for the total fixed rent of Rs. 40 since the Shak year 1745 (1823-24 A. D.). As to that, you intimate to me that a fresh lease should be granted by me in regard to the same. The same (request) being considered, and it being further considered that you and your father had been very useful to me, this fresh Miras lease is granted. Therefore you should pay Rs. 40 every year as rent in respect of the above land, as you have been paying hitherto and enjoy the same. In future when on a survey being made of the land the assessment may be increased or decreased, you should pay accordingly and enjoy the said land yourself, your sons and grandsons, etc., from generation to generation. You will not be molested for more. Forwarded on the 19th moon of the year one thousand two hundred and forty-nine. The lunar date the 5th of Jeshta Vaidya Shake 1770 (21st June 1848), the name of the cyclical year being Kilak.

* *Katban* = A grant or tenure in perpetuity for a fixed sum.

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Under the terms of the said Miraspatra the defendants' family continued to hold the land on payment of the fixed rent to the grantor Shekh Khan Mahomed till his death in 1872. After that year the defendants continued in possession on payment of the rent to the holders of the Saranjam for the time being or to Government when the Saranjam was resumed by Government owing to the death of the incumbent. In the year 1894 Government recognized the plaintiff as the holder of the Wai Saranjam, and he in the year 1904 brought the present suit to recover possession of the land in dispute from the defendants, alleging that they had been enjoying the land as Mirasdars under the former holders of the Saranjam and that the Miras grant was not binding on him.

The defendants contended *inter alia* that they were the Mirasdars of the land in dispute and the plaintiff had only the right of getting rent every year from them; that only the rent of the land was paid to the plaintiff, his ancestors and Government when the property was under attachment; that whenever the property was attached by Government, only the right to get the rent was attached, that the defendants' Miras right was thus recognized by Government and that the suit was time-barred.

The Subordinate Judge found that the Saranjam was handed over by Government to the plaintiff free of any incumbrances or other jural relations created by the previous holders, that the defendants were neither annual nor perpetual tenants of the land, they being occupants of the land were *quasi* tenants from year to year at the will and pleasure of the Saranjamdars, that the Saranjam included the ownership of the soil and was not restricted to the revenue of the land and that the plaintiff was entitled to recover possession. He, therefore, allowed the claim for the following reasons:—

Now the present holder of the saranjam is 5th in descent from Shekh Mira I to whom the grant of the saranjam was made in 1708 (1716?) A. D., and the title of the re-grant in his (present holder's) favour dates from 1894 (exhibit 42). The history as to how the property has been held by successive holders shows that each of them has received it at the pleasure of the then ruling power either for the military service to be rendered at the time of the grant or on

political considerations entirely within the discretion of the paramount power. The words of the grant from time to time predicate rather the break of the old estate with the death of the holder than its continuity through him to the new holder. The words showing continuity from generation to generation have to be given in this case restricted sense and not their usual significance; and this is evident from the nature of the estate passed. It is argued for the defence that the words in the *saraj* relating to the lands called Katban, suggest that they were already in the occupation of the plaintiff's family and the grant created only the right under which they were thereafter to be held. It was argued that accordingly the powers of resumption to be exercised by Government at the death of the holder of the *saranjam* cannot go beyond what was originally granted. It cannot disturb the occupancy right. The import of the document was under the consideration of their Lordships of the Privy Council, and whatever their effect so far as the plaintiff's interest is concerned as against Government, they cannot be available to defendants who come under the grant of Khan Mahomed II and he could not pass more than what he had. He could give the life estate he had, and the words of the title-deed of the defendants itself indicate that a regrant was considered necessary and desirable. It has been decided by the Privy Council that no distinction can be drawn between the Inam and the other property in question, and the whole of the property including the Inam has to be continued as a personal and military Jahagir. Government's action from time to time was based on political considerations and the tenure created was political. The scope of defendants' title must, therefore, be judged from the scope of title of the plaintiff himself. Plaintiff has acquired the title as a holder under a re-grant of the *saranjam*, and this circumstance cuts asunder all relationships of title through which defendants' claim through the previous holders of said *saranjam*, and there is no continuity of interest through previous holders. Plaintiff acquired the estate free of any jural relationships created between previous holders and defendants. * * * * *

It will be seen from the peculiar nature of the estate successive holders of the *saranjam* have acquired that the defendants in occupation of the lands under them have no subsisting relations either as ordinary yearly tenants or as permanent tenants in the ordinary significance of the two terms. The occupation is of the nature of *quasi* tenants from year to year, if I may so style it, terminable with the estate of the successive holders, and continuable at their pleasure. The acts and omissions of previous holders cannot bind the plaintiff, and time cannot run against him as dating from the period of the last holder's enjoyment of the *saranjam*.

On appeal by the defendants the appellate Court confirmed the decree. The following are extracts from the Appellate Court's Judgment:—

The grant of the *saranjam* to plaintiff is admitted. It is also conceded that the Inam rights in the suit lands belong to the *saranjam* and are passed to plaintiff by the grant. The question is about the *Miras* rights. Plaintiff says

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that these rights were created by former holders of the *saranjam* and that they terminated by the grant to him of the *saranjam* by Government. I feel not the slightest doubt that if plaintiff's former allegation is true, the latter must follow. The question now reduces itself to this whether *Miras* rights were created in defendants by a former holder of the *saranjam* or existed in defendants prior to the very creation of the *saranjam*. It is proved in this case that the *saranjam* was created prior to 1785 (*vide Sanad* * * translated at p. 446 of I. L. R. 17 Bom. 445) and the plaint lands, at any rate, since that year, came to be considered as appertaining to the *saranjam*. It is not, therefore, necessary to go behind 1785. Now the creation of defendants' *Miras* was in 1848 (*vide Exhibit 84*). They are not able to go behind this year. If so, then rights must cease with the death of the grantor unless revived by the next holder of the *saranjam*. It is admitted that not only has the original grantor died but also his successors. Plaintiff who is now the holder of the *saranjam* does not wish to continue defendants' rights and they must vacate. This settles the whole question.

Plaintiff's title was created in 1895 (1894?) from which the present suit is within 12 years. It is not, therefore, time-barred. On this point I was referred to *Radhabai v. Anantrav*, I. L. R. 9 Bom. 198, which is, however, a *vatan* case. A *vatan* succeeds to the *vatan* by right of inheritance. A *Saranjam* is entirely within the gift of the ruling power (I. L. R. 17 Bom. 431) and a successor takes the *saranjam* by virtue of this gift and not by right of inheritance, or any other right.

The defendants preferred a second appeal.

Jayakar, with *G. B. Rele* and *S. R. Bakhle*, appeared for the appellants (defendants):—Our first contention is that under the sanad, exhibit 94, what was granted as *Saranjam* to Shekh Mira I was the revenue of the land and not the land itself. The land is mentioned in the sanad as *Katban*, which word is the corruption of the word *Katuban*, and the meaning of *Katuban* is 'a grant or tenure in perpetuity for a fixed sum': see Molesworth's Dictionary. That being so, the land was thus already in the possession of the grantee as *Katban*, that is *Miras*, and what was granted by the sanad as *Saranjam* was the exemption from the payment of land revenue. The then Government exempted the grantee from the payment of the revenue due to royalty. The language of the sanad is quite clear on the point. Under the sanad the grantee's *Kadim* (old) *Katban* was granted in *Inam*. That means what was granted was the right of Government, namely, the right to receive revenue. Government could not profess to grant what already belonged to the grantee as perpetual tenant.

namely, the land. It was wrong to hold that the grant of the Saranjam affected the soil. Our contention is fortified by the grant of the Miraspatra, exhibit 81. That grant expressly refers to the revenue of the land. The land *Katban* was granted in *Miras* to the plaintiff's ancestor and we were to pay to him, our landlord, the revenue which was Saranjam.

Further, whenever Government resumed the Saranjam on the death of the holder and levied attachment thereon, what was attached was the revenue and not the land. They allowed the land to remain in our possession and we paid them the revenue. If the land was Saranjam Government would have attached the land.

[Batchelor, J. :—What Government resumed was the estate, that would mean the land also.]

We submit that was not so. If the land was Saranjam there was nothing to prevent Government from taking possession of the land by ejecting us, which they never did. Further, by resumption Government does not make itself the absolute owner of the Saranjam. The Saranjam is not extinguished. Government holds as trustee for the next incumbent to be chosen by Government. Such incumbent is generally a capable and an eligible member from the family of the deceased incumbent. A stranger is not generally allowed to come in. Whenever Government re-grants the Saranjam, such re-grant is always accompanied by the cash appertaining to the Saranjam accumulated in the hands of Government.

Further, it has been held that Saranjam is generally the grant of Royal revenue and very rarely soil: *Krishnarav Ganesh v. Rangrav*⁽¹⁾; *Vaman Janardan Joshi v. The Collector of Thana*⁽²⁾; *Ravji Narayan Mandlik v. Dadaji Bapuji Desai*⁽³⁾; *Ramchandra v. Venkatrao*⁽⁴⁾. There is no distinction between Saranjam and Jahagir. They are one and the same.

(1) (1867) 4 Bom. H. C. R. (A. C. J.) 1
at p. 7.

(2) (1869) 6 Bom. H. C. R., A. C. J.
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(3) (1875) 1 Bom. 523.

(4) (1882) 6 Bom. 598 at p. 606.

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Our next contention is that the suit is time-barred. The lower Court has computed the period of limitation from the time of the plaintiff's selection as Saranjamdar in the year 1894. But that is not a correct view. According to the nature of the Saranjam holding, each incumbent is only a life-member. Assuming that the grant of the Saranjam included land, then the land came into our possession in the year 1848 under the terms of the Miraspatra granted by Shekh Khan Mahomed. He died in the year 1872, therefore the grant of the Miras by him also came to an end in that year. Notwithstanding that the grant thus came to an end we have continued in possession up to this day. Since 1872 we have been in possession. Therefore adverse possession began to run in our favour from the year 1872 and the present suit was brought in the year 1904. It is therefore clearly time-barred: *Dattagiri v. Dattatraya*⁽¹⁾; *Nilmony Singh v. Jagabandhu Roy*⁽²⁾; *Behari Lal v. Muhammad Muttaki*⁽³⁾; *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*⁽⁴⁾; *President, &c., of the College of St. Mary Magdalen, Oxford v. The Attorney-General*⁽⁵⁾; *Bobbett v. South Eastern Railway Company*⁽⁶⁾.

Coyaji, with *G. S. Rao*, for the respondent (plaintiff):—This is a suit in ejectment and our title has been held proved. It was argued that the Saranjam was the grant of revenue and not of land. The documents relied on for this contention are of doubtful import. What was granted by the sanad, exhibit 94, was *thikan Katban*, that is land *Katban*. What is to be considered is what is the inference of fact to be drawn from the documents, and both the lower Courts have concurred in drawing that inference. Such an inference cannot be interfered with in second appeal.

The Saranjam and Inam have been held under one political tenure: *Shekh Sultan Sani v. Shekh Ajmodin*⁽⁷⁾. This ruling of the Privy Council, though not *res judicata*, is relevant under sections 13 and 43 of the Evidence Act. It shows that Saranjams and Inams stand on the same footing and there is no distinction between them. In the year 1785 the character of the Saranjam

(1) (1902) 27 Bom. 363.

(2) (1896) 23 Cal. 538.

(3) (1898) 20 All. 482.

(4) (1899) L. R. 27 I. A. 69.

(5) (1857) 6 H. L. C. 189.

(6) (1882) 9 Q. B. D. 424.

(7) (1892) 17 Bom. 431.

holding was changed and it was brought to the level of Inam holding as shown in the above ruling.

Saranjam and Jahagir are different estates. They differ in their nature: *Gulabadas Jaggivandas v. The Collector of Surat* ⁽¹⁾; *Dosibai v. Ishvardas Jaggivandas* ⁽²⁾.

The point of adverse possession was not taken in the first Court. There was an issue on the point of limitation in appeal and the finding thereon was in the negative. When a party is in possession, his possession must be referred to a legal and not to an illegal origin. The defendants set up tenancy, therefore their possession cannot be adverse to us: *Dadoba v. Krishna* ⁽³⁾; *Budesab v. Hanmanta* ⁽⁴⁾; *Thakore Fatesingji v. Bamanji A. Dalal* ⁽⁵⁾.

The cases relied on in support of the point of adverse possession relate to Vatan and not to Sarangam. Vatan estate is hereditary, while Saranjam is only a life estate: *Ramchandra v. Venkatasao* ⁽⁶⁾. On the death of the Saranjamdar the property goes to Government. The period of adverse possession against Government is sixty years. It is not shown when the defendants' possession became adverse to us.

Jayakar in reply:—The decision of the Privy Council in *Shekh Sultan Sani v. Shekh Ajmodin* ⁽⁷⁾ does not touch the point as to the construction of the sanad in suit.

The land is mentioned in the sanad because its revenue was to be paid to the landlord.

Our possession became adverse from the year 1872 when Shekh Khan Mahomed who gave the Miraspatra to us died. Further there is evidence in the case, exhibit 73 and exhibit 79, which shows that in the years 1885 and 1889 we claimed to hold as Mirasdars, while the present suit was filed in the year 1904.

The cases relied on for the purpose of showing that Saranjam and Jahagir are distinct, turned upon the words of the particular grants therein.

(1) (1878) 3 Bom. 186.

(2) (1891) 15 Bom. 222.

(3) (1879) 7 Bom. 34.

(4) (1896) 21 Bom. 508.

(5) (1903) 27 Bom. 515.

(6) (1882) 6 Bom. 598 at p 606.

(7) (1892) 17 Bom. 431.

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SCOTT, C. J.:—This is a suit in ejectment brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants.

It was conceded in the lower Court that the 'Inam' rights in the lands in suit appertain to a Saranjam held on political tenure and that the present incumbent of the Saranjam is the plaintiff. The defendants, however, contend that the Inam rights are merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were prior to the date of the Inam grant vested in the grantee of the Inam, have descended to his heirs independently of the Inam, and have furnished the permanent leasehold or Mirasi interest by virtue of which the defendants resist the plaintiff's claim to eject them. The lower appellate Court held it proved that the Saranjam was created prior to 1785 and that the lands in suit, at any rate since that year, came to be considered as appertaining to the Saranjam. As the lease under which the defendants claim dates only from 1848, the finding of fact of the lower Court disposes of the point.

If the question were, as urged by Counsel for the defendants, a mixed question of fact and law it must, nevertheless, be decided against the defendants. The contention involves the denial of the title to the reversionary rights in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants have, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They are thus estopped by attornment from disputing the plaintiff's title. See *Vasudev Daji v. Babaji Ranu*⁽¹⁾ and *Doe dem. Marlow v. Wiggins*⁽²⁾. In so far as the defendants' case depends upon the construction of the Sanad of 1785, the decision of the lower Court rests upon the authority of the judgment of the Privy Council in favour of Sheikh Ajmodin, the Saranjamdar, who succeeded their lessor, against Sheikh Sultan Sani, their lessor's devisee, with reference to the lands in suit. A reference to the report of the proceedings in that litigation will show that the lands in suit were held not to be the private heritable and devisable property of the defendants' lessor but to

⁽¹⁾ (1871) 8 Bom. H. C. R. (A. C. J.) 175.

⁽²⁾ (1843) 4 Q. B. 367.

be held on political tenure as part of the Saranjam. See *Shekh Sultan Sani v. Shekh Ajmodin*⁽¹⁾.

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The defendants' second line of defence was that the plaintiff's right is barred by the adverse possession of the defendants for upwards of twelve years under a claim to hold as permanent tenants. It is urged that time will run against the successive Saranjamdars for the same reasons as it was held to run against successive Watandars in *Radhabai v. Anantrav*⁽²⁾. This defence involves an examination of the nature of the particular estate with which we are concerned. The nature of the estate appears clearly from the judgment of the Privy Council in *Shekh Sultan Sani v. Shekh Ajmodin*⁽¹⁾. It is there stated that in consequence of the advice of Mr. Elphinstone the Court of Directors, in a despatch of the 26th October 1842, directed that the Jaghir of Shekh Mira (being the estate in question) "already restored to the son of the last holder but for life only must be considered hereditary". "It remained for Government," say their Lordships, "when necessity should arise to determine to whom it should regrant or in whom it should recognise a right of succession to the Jaghirs then possessed by Khan Mahamed". Khan Mahamed died on the 31st of December 1872. It then became necessary to determine to whom his Saranjam should be granted. Amongst the candidates was Shekh Ajmodin, the respondent, a descendant of Shekh Abdul Khan, the half brother of Khan Mahomed. This led to a Resolution by the Government dated the 23rd of October 1873 "that the Agent for Sardars should be requested to investigate judicially and after due notice to all parties concerned whether Shekh Ajmodin is under Mahomedan law the legitimate successor to the headship of the family either by adoption or descent." On the 28th November 1873, the Agent reported that Shekh Ajmodin was not the legitimate successor to the headship of the family under Mahomedan law as Khan Mahomed had left a daughter and she had sons who were nearer the head of the family than Shekh Ajmodin, but he recommended that any property the succession to which Government had power to regulate should go

(1) (1892) 17 Bom. 431.

(2) (1885) 9 Bom. 198.

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to Ajmodin. On the 27th March 1874 the Government confirmed the Agent's report in the following terms :—

“ Resolution.—The proceedings of the Agent for Sardars are approved and for the reasons given by Baron Larpent Shekh Ajmodin should be recognised as the head of the family to whom the Saranjam should be continued. To avoid disputes, the allowances for maintenance of the widows of the deceased Shekh Khan Mahomed and Shekh Abdul Kadar and of any others who have a claim for maintenance on the estate should be settled by order of Government after receiving the recommendation of the Agent. The allowances now paid to Shekh Rakmodeen and Rahimanbee under Government letter of 28th March 1861 should be continued.”

This arrangement having been approved by the Secretary of State, the whole of the Jaghir and Inam incomes were made over to Shekh Ajmodin, and the agent and the administrators of the estate which had been taken into the hands of Government called on all persons to acknowledge him as owner.

Their Lordships conclude their judgment as follows :—

“ Their Lordships, however, are of opinion that no distinction can be drawn between the Inam and the other property in question. As has been pointed out, the Sanad of 1785 included the inam villages and lands with the Mokasa as parts of one Saranjam for the support of troops. The effect of the treaty of the 3rd July, 1820, was to continue to Shekh Mira the whole of the property, including the inam, as a personal and military jaghir. This was done by the Government on political considerations, and the tenure thereby created was political. This was the view taken by the Government in 1876, when it adopted the report of the Alienation Settlement Officer that ‘ the whole estate intact, Saranjam and Inam, as restored after the war under the treaty of 3rd July, 1820, is continuable as a guaranteed estate to the adopted son ’ (Ajmodin) ‘ as the head of the family ’.

“ Their Lordships, therefore, concur in the opinion expressed by the Governor-in-Council that a mixed estate of Saranjam and Inam was granted by the treaty of July, 1820, to be held on the

same political tenure, and passed intact to the person whom the Government might recognise as the head of the family."

The estate then is a guaranteed hereditary estate. The right to succession is in the family, but it is subject to regulation by Government. When there is a delay in the choice of a successor to the last incumbent, Government collects the revenues for the next holder. The holder has no power of testamentary alienation and presumably has no greater powers with regard to the estate than the holders of other Saranjam estates which are, as a general rule, inalienable and impartible. See *Radhabai v. Anantrav*⁽¹⁾.

It was conceded that a Saranjamdar would not, except possibly for necessity, have power to create a Mirasi lease to enure beyond his life-time, and the defendants could not, after Khan Mahomed's death, successfully base their possession upon the lease of 1848. The defendants' contention was disposed of by the lower Court on the ground that a successor takes the Saranjam by virtue of the gift of the ruling power and not by right of inheritance or any other right, and that as the plaintiff succeeded in 1895 and the suit was filed in 1904, the claim is not time-barred. It is clear from what has been said above that the lower Court did not rightly apprehend the nature of this particular estate. In its incidents it resembles Ghatwali estates of the kind investigated by the Privy Council in *Rajah Nilmoni Singh v. Bakranath Singh*⁽²⁾, estates which are not transferable nor divisible, which are hereditary though not governed by the ordinary rules of inheritance, and which are subject to the condition of the Government's approval of the heir. Against the successive holders of such estates rights may be acquired by adverse possession. See *Tekait Ram Chunder Singh v. Srimati Madho Kumari*⁽³⁾. In that case it was held that time would begin to run not from the commencement of the tenancy of persons claiming to hold as permanent tenants but from the date when the claims of the parties became openly and undoubtedly adverse. In the present case it is shown that at least from 1889 the defendants openly asserted their claim to hold as permanent Mirasi tenants. As this was

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(1) (1885) 9 Bom. 214, Note (8).

(2) (1882) L. R. 9 I. A. 104.

(3) (1885) L. R. 12 I. A. 188 at p. 197.

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more than 12 years before suit the defendants have acquired a title to the limited interest claimed by them and cannot be ejected.

We, therefore, allow the appeal. We set aside the decree of the lower appellate Court and dismiss the suit with costs throughout.

Decree set aside and suit dismissed.

G. B. R.

APPELLATE CRIMINAL.

Before Mr. Justice Batchelor and Mr. Justice Knight.

EMPEROR v. BALVANTRAO ANANTRAO.*

1910.

January 19.

Bombay A'bkári Act (Bombay Act V of 1878), sections 43 (b), 47†—Cocaine—Illegal possession—Removal—Transportation of cocaine.

Accused No. 1 who was illegally in possession of cocaine brought it from his room and gave it to accused No. 2 who stood opposite his house. The latter carried it to some distance and delivered to a Purdeshi. The two accused were, under these circumstances, charged with transporting cocaine, an offence punishable under section 43 (b), of the Bombay A'bkári Act, 1878. The Magistrate however, acquitted them of the offences and convicted them of illegal possession of cocaine, under section 47 of the Act. Against this order of acquittal, the Public Prosecutor appealed to the High Court:

Held, that the Magistrate was right in declining to convict the accused under section 43 (b), of the Bombay A'bkári Act, 1878, inasmuch as the accused's

* Criminal Appeal No. 413 of 1909.

† Sections 43 (b) and 47 of the Bombay A'bkári Act (Bombay Act V of 1878) runs as follows:—

43. Whoever, in contravention of this Act, or of any rule or order made under this Act, or of any license, permit or pass obtained under this Act,—.....

(b) transports or removes liquor, hemp or any intoxicating drug from one place to another, or shall be punished for each such offence with fine which may extend to one thousand rupees or with imprisonment for a term which may extend to six months, or with both.

47. Whoever, except under the authority of some license, permit, pass or special order obtained under this Act, has in his possession within any local area or place to which the provision of section 17 has been applied, any larger quantity of country liquor or of any intoxicating drug than may legally be sold by retail under the provision of the said section, shall be punished with fine which may extend to two hundred rupees.

offence consisted not in moving the cocaine from one place to another, but in the unauthorised possession of it at any place in contravention of the Act.

Section 43, clause (b), seems to contemplate rather the case of a person who is in lawful possession of cocaine at one place, but is by law forbidden to remove it either partly or wholly to another place.

APPEAL by the Government of Bombay from an order of acquittal recorded by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

Balwantrao and another were tried for an offence punishable under section 43 (b) of the Bombay A'bkari Act, 1878, the former on a charge that on the 30th September 1909 at Fanas Wadi, Bombay, he transported 13 ounces of cocaine and the latter that he aided and abetted the offence.

The possession of cocaine by Balvantrao was unlawful from its inception. It was removed by him from his room at Fanas Wadi and handed to accused No. 2 who stood near the gate of the Wadi; and then the latter proceeded with the cocaine from thence to Bhang Wadi where he handed the parcel to a Purdeshi.

The Magistrate found that as the word "place," was not defined in the Bombay A'bkari Act, 1878, there was no illegal transport or removal of the cocaine within the meaning of section 43 (b) of the Act: he, therefore, acquitted both the accused of the offence, and convicted them only of illegal possession of cocaine under section 47 of the Act. His reasons were as follows:—

"The word 'place' is not defined in the A'bkari Act and the defence contends that the removal of cocaine from accused's house at Fanas Wadi to Bhang Wadi would not be a removal from one place to another within the meaning of section 43, that a removal from one place to another must mean a removal from one village or town or district to another and that if the evidence is believed the only section under which accused can be convicted is that possession under section 47. The defence also contend that in the absence of evidence to show the transport was illegal the only section under which accused can be convicted is section 47. I think this later contention must be upheld. I convict accused under section 47."

The Public Prosecutor appealed to the High Court from the order of acquittal.

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ANANTAO.*M. B. Chaubal*, Government Pleader, for the Crown.*Gadgil*, with *D. R. Patwardhan*, for the accused.

PER CURIAM :—We think that we ought not to interfere with this acquittal, and that the Magistrate was right in declining to convict the accused under section 43 (b) of the Bombay A'bkari Act V of 1878. The fact was that the accused's possession of this cocaine was altogether illegal, and, in these circumstances, it seems to us that section 43 (b) does not apply. That section seems to contemplate rather the case of a person who is in lawful possession of cocaine at one place, but is by law forbidden to remove it either partly or wholly to another place. Here the offence consisted not in moving the cocaine from one place to another, but in the unauthorised possession of it at any place in contravention of the Act. The appeal, therefore, must be dismissed.

Appeal dismissed.

R. R.

APPELLATE CRIMINAL.

Before Mr. Justice Batchelor and Mr. Justice Knight.

EMPEROR v. MULJI DAMODARDAS.*

*City of Bombay Municipal Act (Bom. Act III of 1888), section 390—
Factory—Municipal Commissioner, permission of—Unauthorised factory.*

The accused obtained the Municipal Commissioner's permission (section 390 (1) of the City of Bombay Municipal Act, 1888), to establish a hand-loom factory worked by an oil engine but by means of this oil engine he also established a flour mill—without any permission. The accused was, therefore, charged with the offence under section 390 (1) of the Act :—

Held, that the accused was guilty of a technical offence under section 390 (1) of the City of Bombay Municipal Act, 1888 : for although the accused had leave to establish the hand-loom factory, he had no leave to establish the flour mill factory, which was not the less another and a separate factory because it happened to be worked by the same power which it was proposed to employ in the permitted factory.

* Criminal Appeal No. 452 of 1907.

APPEAL by the Government of Bombay from an order of acquittal passed by P. H. Dastur, Second Presidency Magistrate of Bombay.

Mulji Damodardas obtained from the Municipal Commissioner of the City of Bombay a permission, under section 390 (1) of the City of Bombay Municipal Act, 1888, for the establishment of a hand-loom factory to be worked by an oil engine.

It appeared that Mulji (accused) instead of using the oil engine solely for the purpose of working a hand-loom factory used it also for the purpose of working a flour mill.

The accused was under these circumstances tried for an offence under section 390 (1) ; but the Magistrate acquitted him.

The Public Prosecutor appealed to the High Court from the order of acquittal.

Strangman, Advocate General, with *E. F. Nicholson*, Public Prosecutor for the Crown.

Inverarity, with *T. R. Desai*, for the accused.

PER CURIAM —The respondent here was charged before the Presidency Magistrate, with having committed an offence under section 390 (1) of the Bombay Municipal Act III of 1888. He was acquitted by the Magistrate, and the Government of Bombay appeals against that acquittal.

Section 390 (1) lays down that—

"No person shall newly establish in any premises any factory, workshop or workplace in which it is intended that steam, water or other mechanical power shall be employed, without the previous written permission of the Commissioner."

The accused obtained the Municipal Commissioner's permission to establish a hand-loom factory, worked by an oil engine. But by means of this oil engine the accused has also established a flour mill. It seems to us quite clear that he is guilty of a technical offence under section 390. The mechanical power or force is to be distinguished from the factory. And here, although the respondent had leave to establish the hand-loom factory, he had no leave to establish the flour mill factory, which, in our opinion, is not the less another and a separate factory because

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it happens to be worked by the same power which it was proposed to employ in the permitted factory. We are, therefore, of opinion that the acquittal should be set aside, and that the respondent should be convicted of the offence charged. He has undertaken, through his Counsel, not to work the flour mill beyond to-day, without permission under section 390, and in these circumstances we think that a nominal fine of one rupee will be sufficient.

Appeal allowed.

R. R.

APPELLATE CRIMINAL.

Before Mr Justice Batchelor and Mr Justice Knight.

EMPEROR v. RAJA BAHADUR SHIVLAL MOTILAL.*

1910.
 January 19.

*City of Bombay Municipal Act (Bombay Act III of 1888), section 377†—
 Municipal Commissioner—Neglected premises—Notice to remove nuisance
 —Magistrate's discretion.*

The accused was served with a notice of requisition under section 377 of the City of Bombay Municipal Act, 1888, requiring him to remove filth, rubbish, heaps of *cutchra* and stable refuse from a large piece of vacant land belonging to him. He failed to comply with the requisition, and a prosecution was instituted against him. The Magistrate viewed the premises; and having so viewed them, but without hearing any evidence, acquitted the accused, as the premises did not appear to him to be in a filthy condition —

* Criminal Appeal No. 453 of 1909.

† Section 377 runs thus:—

(1) If it shall appear to the Commissioner that any premises are overgrown with rank and noisome vegetation or are otherwise in an unwholesome or filthy condition or, by reason of them not being properly enclosed, are resorted to by the public for purposes of nature, or are otherwise a nuisance to the neighbouring inhabitation, the Commissioner may, by written notice, require the owner or occupier of such premises to cleanse, clear or enclose the same, or, with the approval of the standing committee, may require him to take such other order with the same as the Commissioner thinks necessary:

(2) Provided that, in so far as the unwholesome or filthy condition of such premises or such nuisance as abovementioned is caused by the discharge from or by any defect in the municipal drains or appliances connected therewith, it shall be incumbent on the Commissioner to cleanse such premises,

Held, that the premises having appeared to the Commissioner in a filthy condition, the notice was validly issued under section 377 of the City of Bombay Municipal Act, 1888; and that there having been a non-compliance with the notice, the offence was complete

Held, further, that the Magistrate was wrong in acquitting the accused on the sole ground that the premises did not appear to him to be in such a condition as to justify the issue of a notice under section 377.

Section 377 of the City of Bombay Municipal Act, 1888, enacts that the only condition precedent to the valid issue of a requisition is that it shall appear—not to the Magistrate but—to the Commissioner that the premises are in the condition specified in the section.

CRIMINAL appeal by the Government of Bombay, from the order of acquittal passed by P. H. Dastur, Second Presidency Magistrate of Bombay.

The Municipal Commissioner of the City of Bombay issued a notice under section 377 of the City of Bombay Municipal Act, 1888, calling upon the accused Raja Bahadur Shival Motilal to remove the filth, rubbish, heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him.

The accused failed to comply with the requisition. He was therefore prosecuted.

The Magistrate heard the complainant, recorded the accused's plea of not guilty, and postponed the further hearing as he was desirous of personally viewing the premises. The Magistrate did so: and on the next day of hearing, without hearing any evidence, acquitted the accused, remarking: "The heap was seen by me and it is not *cutchera* but only earth."

As a matter of fact, however, though the accumulation of the rubbish in question had outwardly the appearance of an undulating mound of earth of varying height extending for above thirty yards along the length of the western side of the vacant land, it was found on inspection by the Municipality to be nothing less than a heap of house and stable refuse in all stages of decomposition and that there were at least eighty cart-loads of such refuse in the said heap. The evidence of these facts was available to the complainant at the hearing and the Magistrate was also informed of it.

The Public Prosecutor appealed to the High Court against the order of acquittal.

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MOTILAL.

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Strangman, Advocate General, with *Nicholson*, Public Prosecutor, for the Crown.

Setalvad, with *Bhaishankar*, *Kanga* and *Girdharlal*, for the accused.

BATCHELOR, J.:—The respondent here was served with a notice or requisition under section 377 of the Bombay Municipal Act III of 1888, requiring him to remove filth, rubbish, heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him. The requisition was not complied with and a prosecution was instituted in the Court of the Presidency Magistrate. The learned Magistrate, on the 25th of May, adjourned the case so that he himself might view the premises in question, and having so viewed them, but without hearing any evidence, acquitted the respondent, recording his reason for that acquittal in these words: "The heap was seen by me and it is not *cutchera* but only earth." On this appeal it is represented to us by the Advocate General, on behalf of the Municipal Commissioner, that though the accumulation of the rubbish in question had outwardly the appearance of an undulating mound of earth of varying height extending for about 30 yards along of the western side of the vacant land, it was found, on inspection by the Health Department to be nothing less than a heap of house and stable refuse in all stages of decomposition and that there were at least eighty cart-loads of such refuse in the said heap, that evidence of these facts was available and that the learned Magistrate was so informed. But however that may be, the respondent's acquittal cannot be sustained. The learned Magistrate, I think, has somewhat misread section 377 of the Municipal Act. He has read it as if it enacted that certain consequences should ensue when the premises appeared to the Magistrate to be in a filthy condition. But that is not so. As I understand the section, it enacts that the only condition precedent to the valid issue of a requisition is that it shall appear, not to the Magistrate, but to the Commissioner, that the premises are in such a condition. It is not denied here that these premises did appear to the Commissioner to be in the condition specified; and the notice was, therefore,

validly issued under section 37. That being so, the Magistrate was, I think, wrong in acquitting the accused on the sole ground that the premises did not appear to the Magistrate to be in such a condition as to justify the issue of a notice under the section. It is admitted before us now that the Municipal Commissioner's order has not been complied with. I am, therefore, of opinion that the acquittal should be set aside and that the respondent should be convicted under section 471 of the Act. But, in the circumstances of the case a nominal fine of one rupee will, I hope, be enough.

KNIGHT, J.—I concur.

Appeal allowed.

R. R.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

SAKHARAM HARI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v.
LAXMIPRIYA TIRTHA SWAMI (ORIGINAL PLAINTIFF), RESPONDENT *

1910.

January 20.

*Limitation Act (XV of 1877), Sec. II, Arts. 131, 63—Cash allowance—
Tastik—Arrears of cash allowance, suit to recover.*

The plaintiff, the manager of the temple of Shri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants, the managers of the temple of Shree Madhukeshwar at Banawáji, a sum of Rs. 96 as arrears of a cash allowance (tastik) which the former was entitled to receive from the property of the latter. The defendants admitted the title of the plaintiff to the allowance but pleaded limitation as to the arrears for two out of the six years. The lower Courts applied Article 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal.

Held, that the claim was properly allowed.

A cash allowance of the nature as in the present case is, according to Hindu law, *ribandha* or immovable property; where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due.

* Second Appeal No. 595 of 1909.

1910.

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HARI
v.
LAXMIPRIYA
TIETHA
SWAMI.

But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right.

The important question is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment.

SECOND appeal from the decision of D. S. Sapre, First Class Subordinate Judge, A. P., at Kárwár, confirming the decree passed by R. R. Sane, Subordinate Judge of Sirsi.

Suit to recover arrears of a cash allowance called *tastik*.

The plaintiff was the manager of a temple called the Vyasraja Matha at Hulekal. The temple was in receipt of a cash allowance every year from the defendants who were the managers of the temple of Shree Madhukeshwar at Banawási.

The claim was for arrears which had accrued due during the six years preceding the suit.

The defendants admitted the plaintiff's right to receive the allowance; but they claimed that his right to two years out of the six was barred by limitation.

The Court of first instance held that Article 131 of the Limitation Act, 1877, applied to the case, and decreed the plaintiff's claim in full. His reasons were as follows:—

The plaintiff's right to receive this annual payment is acknowledged by the defendants to be an already established one, since time immemorial. It is therefore not at all necessary for the plaintiff to bring a suit for the establishment thereof. So, he can, in a suit like the present, recover arrears that fell due within twelve years before this suit (*vide Chhaganlal v. Bapubhai*, I. L. R. 5 Bom. 68, followed in I. L. R. 16 All. 189).

It is however contended by Mr. Jede for the defendants that this suit is governed by Article 62 of the Limitation Act. But I think that his contention cannot prevail. For, Article 62 applies to the case of a person, suing for his co-sharer who has received the whole amount from the person primarily bound to pay; whereas Article 131 applies to the case of a *hakdar* (i.e., person entitled to some allowance) suing the person primarily bound to pay him the whole *hak* (vide Starling's Indian Limitation Act, 4th Edition, page 285). In the present case, it is not alleged by the defendants that they and the plaintiff are co-sharers and that as such, they have received the amount of plaintiff's share for plaintiff's use, from a third person primarily liable to pay. According to plaintiff's allegation in the plaint, the temple property being primarily liable for the payment, the managers of the temples for the time being are the persons primarily liable to pay the amount to him. These allegations were not traversed by the defendants although defendant No. 1, who is the principal manager, was examined on oath (exhibit 11).

Again, according to Article 62, the period of limitation is to be counted from the date when the money is *received* by the defendants for plaintiff's use. It is neither alleged nor proved by the defendants that the money payable to plaintiff was at any time received by them from some third person for the plaintiff's use. On the contrary they have distinctly stated in paragraph 3 of their written statement (exhibit 5) that in their account, the year is computed from the 1st of August to the 31st of July of the following year; and that the sum payable to plaintiff for any particular year falls due, after the close of that year. So according to them, the cause of action is to arise in the month of August of each year. This is quite inconsistent with the theory that Article 62 applies to this suit. I am therefore of opinion that this suit is governed by Article 131 of the Limitation Act.

On appeal, this decree was confirmed.

The defendants appealed to the High Court.

K. H. Kelkar, for the appellant.

The respondents did not appear.

CHANDAVARKAR, J.:—In the suit out of which this second appeal arises, the respondent before us as plaintiff sought, as manager of the temple of Shri Laxmi Narayan Dev at Hulekal, to recover the arrears for six years of a cash allowance (*tastik*) due to the temple from year to year from the temple of Shree Madhukeshvar at Banavási, of which the present appellants are managers.

The appellants admitted the title of the respondent to the allowance but pleaded limitation as to the arrears for two out of the six years.

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The Subordinate Judge, who heard the suit, held that the period of twelve years under Article 131 of the Limitation Act applied to the claim for arrears and allowed the whole of the claim. The Subordinate Judge, First Class, who heard the appeal from the original decree, has confirmed it.

On this second appeal it is argued, on the authority of *Chamanlal v. Bapubhar*⁽¹⁾, *Raoji v. Bala*⁽²⁾, *Rathna Mudaliar v. Tirutenkata Chariar*⁽³⁾, that the claim to the arrears is as for money had and received, to which Article 62 of the Limitation Act XV of 1877 applies.

A cash allowance of the nature, such as we have in the present case, is, according to Hindu Law, *nibandha* or immoveable property. Where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and also those which have become actually due. But where there are more than one person entitled to the payment as co-sharers and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right. This is the law clearly established by the decisions of this Court. In *Harmukhgaury v. Harisukhprasad*⁽⁴⁾, it was held that Article 132 of Act IX of 1871 (which is the same as Article 131 of Act XV of 1877) applied to a suit brought by a *hakdar* against the person originally liable to pay the *hak* and not to a suit brought by a co-sharer in the *hak* against another co-sharer who has received from the person originally liable the whole amount. The same principle was adopted in *Desai Maneklal Amratlal v. Desai Shivalal Bhogilal*⁽⁵⁾ and *Dulabh Vahuji v. Bansidharrai*⁽⁶⁾. In

(1) (1897) 22 Bom. 669.

(2) (1890) 15 Bom. 135 at p. 140.

(3) (1899) 22 Mad. 351.

(4) (1883) 7 Bom. 191.

(5) (1884) 8 Bom. 426.

(6) (1884) 9 Bom. 111.

Raoji v. Bala⁽¹⁾ it was held that a suit by one co-sharer to establish a title to a periodically recurring right as against another co-sharer fell, for the purposes of limitation, under Article 131 of Act XV of 1877, whereas a suit by the same co-sharer against the other for arrears of the amount received by the latter and payable, in virtue of his share to the former, fell under Article 62. The decision of this Court in *Chamanlal v. Bapulhai*⁽²⁾ only reaffirms that principle. The important question in all these cases is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is an amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment. The present suit is of the former character and has been rightly held by the lower Court to be governed by Article 131. The decree must, therefore, be confirmed.

Decree confirmed.

R. R.

(1) (1890) 15 Bom. 135.

(2) (1897) 22 Bom. 669.

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SAKHARAM
HARI
५
LAXMIPRIYA
TIRTHA
SWAMI.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1910.
January 24.

RAMKRISHNA NARAYAN SINDE (ORIGINAL DEFENDANT), APPELLANT,
v. VINAYAK NARAYAN SASWADKAR (ORIGINAL PLAINTIFF),
RESPONDENT.*

Transfer of Property Act (IV of 1882), section 85—Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Decree—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members.

A Hindu family living jointly consisted of S., his son M., and his two grandsons S¹. and R. (minors) by a predeceased son. S. mortgaged a house for purposes allowed by Hindu law. The deed of mortgage was signed by S., M. and S¹. represented by his mother. The mortgagee sued on the mortgage and joined S., M. and S¹. as party defendants. The suit passed into a decree, in execution of which the house was sold at a Court auction and purchased by the plaintiff. In a suit by the plaintiff against M., S¹. and R. (S. having died) for possession of the house, R. claimed to exempt from the sale his share in the house which was one-fourth, on the ground that as he was not a party to the suit, he was not bound by the decree.

Held, that though R. was omitted from the suit he was represented by the adult members, who were the managing members of the family.

Held, also, that the debt was contracted by S., the grandfather of R., and R. was bound by it unless it had been contracted for illegal or immoral purposes.

SECOND appeal from the decision of R. D. Nagarkar, First Class Subordinate Judge, A. P., at Poona, varying the decree passed by D. G. Medhekar, Joint Subordinate Judge at Poona.

One Santaji had a son Maruti and two grandsons by a predeceased son : Shivram and Ramkrishna (minors).

In 1893, Santaji mortgaged a house belonging to the family for family purposes. The deed of mortgage was executed by Santaji, Maruti, and Shivram represented by his mother Gojrabai.

* Second Appeal No. 383 of 1908.

In 1901, the mortgagee sued Maruti and Shivram (Santaji having died) upon the mortgage: and obtained a decree against them. In execution of this decree the house mortgaged was sold at a Court-sale and purchased by the plaintiff.

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The plaintiff then sued Maruti, Shivram and Ramkrishna to recover possession of the house. Ramkrishna contended that at least his share in the house (which was one-fourth) was not included in the sale, inasmuch as he not having been a party to the mortgage suit was not bound by the decree passed therein.

The Court of first instance agreed with the contention and passed a decree awarding the plaintiff possession of the house with the exception of Ramkrishna's share. The reasons were as follows:—

The presumption of Hindu law is in favour of joint family and joint property. Plaintiff's case is not that the first defendant had no interest in the property but that whatever interest he had has been sold under the decree, exhibit No. 69 the debt for which the decree was obtained being a joint family debt. But a reference to the mortgage-bond, exhibit No. 49, shows that it contains no recital of the purpose for which the debt was contracted. It is true that the defendant No. 1's mother represented the defendant No. 2 as his guardian *ad litem* in the suit based on the mortgage, but the first defendant was not so represented. The defendant No. 2 was also a party to the mortgage bond, exhibit 49, but not the defendant No. 1. It might be urged that the fact that the defendant No. 2, brother of the defendant No. 1, was a party to the mortgage-bond is sufficient to justify the presumption that the debt was contracted for the benefit of all including the defendant No. 1. But in the absence of any proof of a specific nature, such a presumption would not be justifiable in my opinion. There is nothing to show that there was before the creditor a sufficient material to create on his part a *bond fide* belief that the debt was necessary for any joint family purpose. I am therefore unable to say that the plaintiff purchased the right, title and interest of the defendant No. 1 in the property. Nor is there anything to show that the right of the defendant No. 1 in the property has in any way been extinguished.

On appeal the lower appellate Court came to a different conclusion. It held that Ramkrishna's share also passed by the sale. The following were the grounds:—

The next question is whether the Court-sale is binding upon the defendant No. 1. To prove that it is binding on him, one of the grounds alleged on behalf of the plaintiff is that the loan in the mortgage-bond; exhibit 49, was taken for the benefit of the joint family. The only evidence on the point to

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which attention is drawn is the fact that Maruti, the son of Santaji, and Shivram's mother Gajarabai, the widow of another son (Narayan) of Santaji, on behalf of her minor son joined Santaji in the execution of the mortgage-deed. But this is insufficient to prove that the creditor *bonâ fide* believed that the loan was taken for the benefit of the family in the absence of evidence showing that the creditor made enquiries and had reason to be satisfied as to the necessity for the loan. In the absence of such evidence the debt would not be binding on Shivram himself on the ground mentioned. But in Suit No. 299 of 1901 Shivram agreed to pay the debt under a consent decree and therefore his share in the suit house properly passed under the Court-sale.

Another ground on which the share of the defendant No. 1 in the suit house is sought to be found is that the loan taken under the bond, exhibit 49, having been taken by a grandfather, the defendant No. 1 as grandson was under the Hindu Law bound to pay the debt of his grandfather irrespective of its benefit to himself unless it was tainted with immorality or was otherwise repugnant to Hindu law. Reference is made to the following authorities *Narasimharav v. Antaji* (2 Bom. H. C. R. 64); *Lachman Das v. Khunnulal* (I. L. R. 19 All. 26); *Narayan v. Venkatacharya* (6 Bom. L. R. 434); Mayne's Hindu Law, sections 302 to 304; Mayne's Hindu Law, pages 376 to 380, 6th edition; *Sadashiv v. Dinkar* (I. L. R. 6 Bom. 520). I think this contention must prevail in the absence of a suggestion and of evidence to prove that the debt was one which the defendant No. 1 as grandson was not bound to pay under the rules of Hindu law. The Allahabad ruling quoted is an authority for holding that the debt being secured by a mortgage, the defendant No. 1 was bound to pay it with interest. In this view of the matter it is necessary to go into the question whether the defendant No. 1 was benefited by the debt contracted by his grandfather. The plaintiff as auction purchaser, therefore, acquired title to the one-fourth share of the defendant No. 1 in the suit house.

The defendant appealed to the High Court.

P. P. Khare, for the appellant.

G. S. Rao, for the respondent.

CHANDAVARKAR, J.—It is true that section 85 of the Transfer of Property Act requires that all persons, having an interest in property comprised in a mortgage, must be joined as parties to any suit under Chapter IV of the Act, relating to such mortgage, provided that the plaintiff has notice of the interest. But the section has been construed by the Calcutta and the Madras High Court as not interfering with the rule of Hindu law, that it is open to a father in a Hindu family to represent, subject to certain conditions, his sons or other members in a suit brought

upon a mortgage against him. For instance in *Ramasamayyan v. Virasami Ayyar*⁽¹⁾, the mortgage had been executed by a Hindu father. The suit was brought against him and two of his three sons and there was a decree. A suit having been brought by the third son, it was contended by him that as he had not been made a party to the previous suit upon the mortgage, the decree passed in it, and the sale consequent upon it, did not bind him, and he relied upon section 85. It was held there that the father represented the sons in the absence of proof that the mortgage had been effected for a debt of the father contracted for an illegal or immoral purpose. So also in *Lala Surja Prosad v. Golub Chand*⁽²⁾, the mortgage was by a Hindu father, who, with his son, constituted a joint Mitakshara family. It was held that the father incurred the debt in his representative capacity and as managing member of the family. And the ruling of the Court was that it was open to the son by a suit to question the decree and the sale consequent upon it, but that the son, in order to succeed and entitle him to redeem his share of the property, must show not merely that he had not been made a party to the suit brought against the father, but also that the debt of the mortgage was not binding upon him, having been incurred for an illegal or immoral purpose by the father. The principle seems to be sound and in accordance with the observations of their Lordships of the Privy Council in *Khierajmal v. Daim*⁽³⁾.

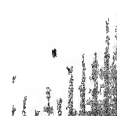
In the present case the mortgage was by Santaji, grandfather of the present appellant, by his uncle Maruti, and by his brother Shivram, a minor, who was represented by his mother, Gojrabai. To the suit which was brought subsequently on the mortgage, the persons brought on the record as defendants were the present appellant's undivided uncles, Maruti and Parshram, and his undivided brother Shivram who had at that time arrived at the age of majority. The present appellant was, no doubt, omitted from the suit, but the adult members of the family represented him. They were the managing members

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(1) (1898) 21 Mad. 222.

(2) (1900) 27 Cal. 724.

(3) (1904) L. R. 32 I. A. 23 at p. 35.



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of the family. Therefore, according to Hindu law, we must hold, in the absence of any other circumstance, that the present appellant had been substantially represented upon the record, and was virtually a party to the suit. Further, even if Shivram, the brother of the appellant, had not been brought upon the record, there was Maruti, the eldest managing member of the family. The debt again was one contracted by Santaji, the grandfather of the appellant, and the latter is bound by it unless it had been contracted by Santaji for illegal or immoral purposes. It has been found that the debt had been contracted by the managing members of the family for its benefit and necessities.

On these grounds the decree must be confirmed with costs.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Dazari.

1908.

March 3.

UMABAI, PLAINTIFF, v. BHAU BALWANT AND OTHERS, DEFENDANTS *

*Civil Procedure Code (Act V of 1908) Order I Rule 3, Order II Rule 3—
Grades of several defendants in one suit—"Same act or transaction"—
"Series of acts or transactions"—Practice.*

In reading order I, Rule 3, of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word "same" which precedes the words "acts or transaction" governs also the words "series of acts or transactions" and must be read before those words also. The first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the *same* act or transaction or from the *same* series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit *both* the conditions laid down in the rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally or in the alternative,

* Suit No 651 of 1907.

must arise from the same act or transaction or the same series of acts or transactions. And, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact.

The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are "jointly liable in respect of each and all of such causes of action" and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all 'have a joint interest in the main question raised by the litigation' and that causes of action joined in one suit against several defendants must be causes of action in which "the defendants are all jointly interested".

It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary.

THE material facts in this case appear sufficiently from the judgment. At the hearing of the suit counsel for the 1st defendant raised amongst others the following issues :—

- (1) Whether this Court has jurisdiction to try this case.
- (2) Whether the suit is not bad for reason of mis-joinder of causes of action and of parties.

These two issues were ordered to be tried as preliminary issues.

Setalvad with *Raihes* for 1st defendant referred to Order 1, Rule 3, of Civil Procedure Code of 1908. Their right to relief arises from (1) adoption and (2) from mortgages. One transaction has nothing to do with the other. This is a combination of two distinct suits and transactions. No common question of fact or law would arise if separate suits were brought *Narsingh Das v. Mangal Dubey*⁽¹⁾, *Mowji Monji v. Kuverji Nanaji*⁽²⁾, *Ram Narain Dut v. Annoda Prosad Joshi*⁽³⁾, Succession Certificate Act (VII of 1889), section 4.

Umabai could not sue without taking out letters of administration or a succession certificate.

Strangman, Advocate-General, (with him *Inverarity* and *Jayakar*) for the plaintiff.

(1) (1882) 5 All. 168.

(2) (1907) 31 Bcm. 516.

(3) (1887) 14 Cal. 681.

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The point must be decided on the Civil Procedure Code of 1908. Our cause of action is the mortgage in which all the defendants are interested vitally. Common questions of law or fact arise. Under Order 1, Rule 5, it is not necessary that all the defendants should be interested in all the reliefs sought. Even under the old Code this would have been a good suit. See Farran, C. J., in *Raghunath Mukund v. Sarosh K. R. Cama*⁽¹⁾. *Narsingh Das v. Mangal Dubey*⁽²⁾ is no longer law as the ratio of that case disappears now. There were in that suit three causes of action. Here there is only one cause of action namely the mortgage claim, and a part of it is in the 1st defendant's hands *Serajul Huq Khan v. Abdul Rahaman*⁽³⁾; *Sri Raja Sinhadri Appa Rao v. Porttipati Ramayya*⁽⁴⁾. *Mcwji Monji v. Kurji Nanaji*⁽⁵⁾ is in our favour. No embarrassment is caused to 1st defendant and the other defendants don't appear and plead embarrassment. Order 2, Rule 1.

Setalvad in reply referred to *Strook v. Lawson*⁽⁶⁾. Two conditions must coincide in Order 1 Rule 3. In this case there are two transactions (1) the adoption, (2) the mortgage, entirely unconnected with each other. Order 1, Rule 5, must be taken in connection with Order 1, Rule 3.

Raghunath Mukund v. Sarosh K. R. Cama⁽¹⁾ relied on is different and does not apply to the facts of this case. So also in the other cases relied on there was one cause of action. That there is no embarrassment is no defence against multifariousness, it is a defence where joinder is allowed. But there is considerable embarrassment if you look into the nature of the contentions. The adoption took place in Poona. All the evidence is in Poona.

DAVAR, J.:—At the hearing of this suit Mr. Setalvad for the first defendant raised among others the following issues:

(4) Whether the Court has jurisdiction to entertain this suit.

(5) Whether the suit is not bad for reason of mis-joinder of causes of action and of parties.

(1) (1899) 23 Bom. 266.

(2) (1882) 5 All. 163.

(3) (1902) 29 Cal. 257.

(4) (1905) 29 Mad. 29.

(5) (1907) 31 Bom. 516.

(6) [1898] 2 Q. B. 44 at p. 54.

The learned counsel after the issues had been raised and the Advocate-General had stated the facts of the case applied that the two issues Nos. 4 and 5 which involved questions of law should be tried first. The Advocate-General did not object to this being done. Order XIV, r 2, provides that where in the same suit issues both of law and of fact arise and the Court is of opinion that "the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first."

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On the pleadings and the undisputed facts it did appear to me possible that the suit, or at all events a part of this suit, may be disposed of by determination of these issues of law, and I felt that it was desirable in the interest of the parties that these issues should be tried first.

It seems to me however that the decision of issue No. 4 as to the jurisdiction of this Court depends on my decision on issue No. 5 as to whether this suit is bad by reason of misjoinder of causes of action and of parties and the results that may follow from my decision of that issue. I will, therefore, in the first instance confine my attention to the consideration of the question for decision involved in that issue. To arrive at a correct decision on the issue as to misjoinder, it is necessary that the facts must be clearly appreciated.

The undisputed facts are to be gathered from the plaint in this suit and the plaint in suit No. 8 of 1906 which is referred by the plaintiff herein in para 6 of her plaint.

One Vithoba Khundappa Gulve died on the 11th of September 1891 leaving a will dated the 27th of January 1890. The 9th and 10th defendants Nilkant Vinayak Chatre and Shanker Ramchandra Phatarpikar were appointed executors under the will. Probate of the will was granted to the two executors by the Thana District Court on the 28th of October 1891. The 9th and 10th defendants are made parties to this suit in their capacity as executors of Vithoba's will.

The will of Vithoba directed that the residue of his estate should be divided in two parts and one of such parts should be given to Shanker Vithoba Gulve. The plaintiff claims to be

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Shanker's sister. The Advocate-General in his opening stated that Shanker and the plaintiff Umabai were the illegitimate children of Vithoba by a mistress named Paroo Pringlay. The first defendant's counsel does not admit that the plaintiff is the sister of Shanker. He said his client had no knowledge whether this statement was correct or not. For the present purposes it is immaterial to consider the question whether Umabai is or is not the sister of Shanker. I will assume that Umabai the plaintiff is the sister of Shanker and as such his next of kin.

Vithoba Khimdappa Gulve during his lifetime had, on the 4th of December 1883, lent and advanced to the members of a Hindu family of Bombay named Patker the sum of Rs. 11,000 on the mortgage of an immoveable property belonging to them and situated at Bhuleshvar in Bombay. This mortgage was outstanding at the time of his death. Vithoba's executors divided his property in two parts and made over one of such parts to Shanker. The mortgage was included in the part of Vithoba's property made over to Shanker. The executors did not at any time execute any written assignment or transfer of the mortgage. Shanker died on the 23rd of January 1903 intestate and without any issue. He left surviving his widow Girjabai who was also known as Umabai. Although in suit No. 8 of 1903 she is spoken of only as Umabai, I will continue to call her Girjabai in order to prevent any possible confusion arising from this name being the same as that of the plaintiff. The mortgage moneys were still outstanding when Shanker died, one of the terms of the mortgage being that the mortgage moneys were to be repaid ten years after the date of the mortgage.

Girjabai was a minor when her husband died, and the District Court of Poona in June 1903 appointed her father Balvantrao Suryavanshi the guardian of her person and property. Some time in 1904 Girjabai by her guardian applied to the District Court at Poona for leave to adopt her minor brother and having obtained such leave, she adopted him. This adopted boy Bhau Balvant Suryavanshi, who, after the adoption, was called Vithal Shanker Gulve, is the first defendant in the suit. Shortly after the adoption Girjabai died on the 3rd of January 1905.

On Girjabai's death the Poona Court appointed two persons as guardians of the person and property of the minor Vithal Shanker Gulve.

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In the beginning of 1906 the said minor Vithal by his guardians as his next friends filed a suit against the members of the Patkar family to realise the mortgage debt. The mortgaged property being in Bombay the suit was filed in this Court.

When that suit was filed the plaintiff alleged that the amount due to him under the Indenture of mortgage with interest up to the 29th of October 1905 was Rs. 32,018-2-3 and he claimed to recover that sum and further interest. The executors of Vithoba's will not having executed any legal assignment or transfer of mortgage were made co-defendants in the suit and they were defendants Nos. 8 and 9. This suit was heard before me on the 19th of February 1907. At the hearing it was proved before me that the guardians of the minor plaintiff and the first seven defendants had arranged a compromise of the claim for Rs. 20,000, that this compromise was submitted to the District Court of Poona; and that that Court had sanctioned the proposed compromise. I was asked to pass a decree in terms of the compromise. As the Court, whose ward the plaintiff was, had sanctioned the compromise, I passed a decree by consent of all parties in terms of the compromise and sanctioned the same as being for the benefit of the minor plaintiff. When that suit was called on, the 8th and the 9th defendants, the executors of the will of Vithoba, did not appear but, while I was recording evidence, counsel appeared on their behalf and brought to my notice the fact that the adoption of the plaintiff in the suit was disputed in a suit pending in the Poona Court. It then transpired that Vithal had filed a suit in the Subordinate Judge's Court at Poona to recover the keys of a safe and certain documents from Sirdar Natu and that Sirdar Natu had put in a written statement alleging that Vithal's adoption was not valid and asking that Shanker's sister Umabai should be made a co-plaintiff. On being apprised of this fact I felt that Umabai's interests should in same way be safeguarded and at my suggestion the plaintiff undertook to allow the amount realised to remain with his

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attorneys for six months to enable Umabai to establish her contention that the adoption of the plaintiff in that suit was invalid and that she as next-of-kin was entitled to the property left by her brother Shanker. The plaintiff's attorneys were directed to give notice of the decree to Umabai. The consent decree in Suit No. 8 of 1906 is exhibit No. 1 in this suit.

It is proved before me in this suit that the mortgagors paid the amount for which the claim of Vithal was compromised and on such payment in terms of the arrangements arrived at between the parties, the executors of Vithoba executed a re-conveyance of the mortgaged premises on the 18th of July 1907 and the guardians of Vithal executed the same re-conveyance on the 27th of July 1907. The re-conveyance in favour of the mortgagor is exhibit No 2.

This is a short history of the events as they happened before the plaintiff Umabai filed this suit on the 15th of August 1907.

The first defendant in this suit is Vithal Shanker Gulve, the son adopted by Girjabai the widow of Shanker after his death.

Defendants Nos. 2 to 8 are the members of the Patker family the mortgagors who had originally mortgaged their Bombay property to Vithoba Khundappa Gulve.

Defendants Nos. 9 and 10 are the executors of the will of Vithoba. The plaintiff says that Shanker before his death had given instructions to Girjabai that she should adopt one of her sons; that her sons were available for adoption, that the adoption by Girjabai of the plaintiff in contravention of her husband's injunction is invalid and in-operative, and that she as the sister and next-of-kin of Shanker is entitled to the whole of the property left by Shanker.

The plaintiff then impeaches the compromise of the claim made in suit No. 8 of 1906. She says she protested against the compromise before the consent decree was taken and in support of her statement she produces correspondence which is collectively marked Exhibit B. She contends that the consent decree is not binding on her and that the same ought to be set aside.

The reliefs that the plaintiff claims in this suit shortly put are that it may be declared that the first defendant is not the validly adopted son of Shanker and that she as the sister of Shanker may be declared to be the sole heir of Shanker and as such entitled "to the right, title and interest of the said deceased" in the mortgage in the plaint mentioned; that it may be declared that the decree in suit No. 8 of 1906 is not binding on her; and that an order may be made "setting the same aside" as against her. She then prays that defendants 2 to 8 may be ordered to pay to her the full amount that may be found due at the foot of the mortgage and that in default the mortgaged premises may be sold. In the alternative she prays that if the consent decree be not set aside then it may be ordered that the amount received under the compromise may be paid to her. She prays for other incidental reliefs which I do not think it is necessary to refer to.

The question for the consideration of the Court on the facts as set out above is, in the first instance, whether the suit as constituted is bad by reason of misjoinder of causes of action and of parties.

Section 45 of the old Civil Procedure Code dealt with the joinder of several causes of action in the same suit and section 28 dealt with the joinder of several defendants in one suit.

Rule 3 of Order 1 is now enacted in the place of section 28 of the old Code and Rule 3 of Order II takes the place of section 45.

The language of Rule 3 Order II is the same as that of section 45 of the old Code but there is considerable difference in the provisions of Rule 3 of Order I and those of section 28.

The Rule now governing the joinder of several defendants in the same suit provides that—

All persons against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in alternative, where if separate suits were brought against such persons any common question of law or fact would arise, may be joined as defendants in the same suit

In reading this Rule it seems to me quite obvious that the word "same" which precedes the words "act or transaction" governs

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also the words "series of acts or transactions" and must be read before those words also. It seems to me therefore that the first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the *same* act or transaction or from the *same* series of acts or transactions. The second condition to be fulfilled under the Rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons.

In *Stroud v. Lawson*⁽¹⁾, the Court of Appeal had O. XVI, r. I, under their consideration. That is an order providing for the joinder of several plaintiffs in the same suit but the language of the Rule is exactly the same as the language of our Rule 3, Order I. Lord Justice Vaughan Williams, in constructing the Rule before the Court, at page 54 of the report, says :—

The two conditions, namely, that the right to relief must arise from the same transaction and that there must be a common question of law or fact, are not alternative conditions. If that had been meant to be so, the wording of the rule would certainly have been different, as for instance by the insertion of the simple word "or" before the word "where."

It seems, therefore, quite clear that before a plaintiff can join several defendants in the same suit *both* the conditions laid down in the Rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally, or in the alternative, must arise from the same act or transaction or the same series of acts or transactions, and, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact.

Then again, under Rule 3 of Order II, the plaintiff is allowed to unite in the same suit several causes of action against the same defendant or the same defendants jointly.

Since I discussed the question of misjoinder of parties and of causes of action in *Mowji Monji v. Kuverji Nanaji*⁽²⁾ the new Civil Procedure Code, incorporating in it many more Rules of English practice and procedure than were to be found in the old

⁽¹⁾ [1898] 2 Q. P. 44.

⁽²⁾ (1907) 31 Bom. 516.

Procedure Code, has come into operation and a great many Indian cases based on the construction of the language of section 28 of the old Code are of no value. But we have, however, Indian authorities dealing with general principles and the policy of the law on the question now under my consideration and I think they are still very useful guides.

In *Narsingh Das v. Mangal Dubey*⁽¹⁾ a full Bench of that Court held that a plaint had been properly rejected because the suit was open to the objection that different causes of action against different defendants separately had been joined in the same suit.

In the course of the judgment it is said (at p. 171) :—

“The plaintiff has united different causes of action in one suit against different defendants, who are not jointly liable in respect of *each and all of such causes of action*—a mode of procedure that the law does not sanction.”

This statement of the law by the Full Bench of the Allahabad High Court is important having regard to the fact that the language of section 45 of the old Code and that of Rule 3 Order II of the present Code which deal with the joinder of causes of action against several defendants is the same. As I read the judgment it lays down that the meaning of the word “jointly” in the old section, and therefore in this Rule, is that all the defendants in a suit must be jointly liable in respect of “each and all” of the causes of action which the plaintiff unites against the defendants in the same suit.

That this is the correct reading of the Full Bench judgment appears from the decision in *Bhagwati Prasad Grr v. Bindeshri Gir*⁽²⁾ where Mr. Justice Straight delivering the judgment of the Court and speaking of the test of the applicability of section 45 of the old Code says :—

“Joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants.”

The only other Indian case, which I think it is necessary to refer to, is that of *Mullick Kefait Hossein v. Sheo Pershad Singh*⁽³⁾. There again a division Bench, consisting of Mr. Justice Beverley

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(1) (1882) 5 All. 163.

(2) (1883) 6 All. 106.

(3) (1896) 23 Cal. 821.

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and our late Chief Justice Sir Lawrence Jenkins, had under their consideration section] 45 of the Code. In the course of their judgment the learned Judges say (at p. 826):—

“There is no provision in the Code allowing distinct causes of action in which the defendants are *not all jointly* interested, to be united in the same suit.”

Turning to the English Practice we find that Rule 1 of Order XVIII provides that subject to the Rules of that Order the plaintiff may unite in the same action several causes of action. In *Burrell v. Beyfus*⁽¹⁾ the Lord Chancellor, Lord Selborne says:—

“To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected. .) is not contemplated by Order xviii, r. 1, which authorises the joinder, not of *several actions* against distinct persons, but of *several causes of action*.”

The result of the authorities seems to me to be that the plaintiff may in one action unite several causes of action against several defendants, provided that all such defendants are “jointly liable in respect of each and all of such causes of action” and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants, is that such defendants must all “have a joint interest in the main question raised by the litigation” and that causes of action joined in one suit against several defendants must be causes of action in which “the defendants are all jointly interested.”

It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit (O. I. r. 5, Civil Procedure Code) but it is necessary “that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary” (Annual Practice, 1909, p. 163).

Keeping these requirements of the law in view, let me now turn to the facts of this case and see whether these requirements are fulfilled in this suit,

⁽¹⁾ (1884) 26 Ch. D. 35 at p. 39.

The principal defendant in this suit is the first defendant Vithal Shanker Gulve and the main question in this litigation is whether his adoption by Girjabai is good and valid in law as he contends it is or is invalid and in-operative as the plaintiff contends. This is the only question in this suit in which he is interested. If he is declared the validly adopted son of Shanker the suit comes to an abrupt termination—none of the other questions in the suit which affect the other defendants would ever arise. He would then be the owner of the property left by Shanker including the mortgage made by the family of defendants 2 to 8 in favour of Vithoba. He sued to recover the moneys due under the mortgage; the Court whose ward he was sanctioned a compromise of that suit; the Court passing the decree has certified that the compromise was beneficial to him; the moneys decreed are in the hands of his solicitor; the decree is binding on him; and neither he nor the other defendants in the suit raise any question whatever in respect of the mortgage, or the consent decree in suit No. 8 of 1906. As I observed above the validity of his adoption is the only question in which the first defendant is interested. Directly that is established, the suit fails and while that question is tried, the other defendants have nothing to do but to sit with folded arms and watch the result of the fight between the plaintiff and the first defendant. I have noticed what the result of the suit would be if the first defendant's adoption is held to be valid. Now take the other possible result. Suppose the Court comes to the conclusion that the first defendant's adoption is invalid. He immediately loses all interest in the suit. He would then have no interest in Shanker's property and it would be a matter of no interest to him whether the plaintiff succeeds or fails in her contentions against the other defendants. It matters nothing to him whether the decree in suit No. 8 of 1906 is held binding on the plaintiff or not. It matters nothing to him whether defendants 2 to 8 have to pay Rs. 20,000 or Rs. 32,000 and more under the mortgage. The main and the only question he is interested in this litigation is to prove the validity of his adoption.

Now let me turn to the other defendant. The second set of defendants are defendants 2 to 8 the members—the members of the Patker family, the mortgagors of Vithoba. What are the questions

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in the suit between them and the plaintiff? What is the plaintiff's cause of action against them? The plaintiff contends that the compromise of the mortgage debt effected between the first defendant and these defendants is not binding on her. She claims to be entitled to recover the whole amount due under the mortgage. I assume that when the Poona Court sanctioned the compromise of a claim of over Rs. 32,000 for Rs. 20,000 it must have taken into consideration the possibility of the mortgagors being able to reduce the claims originally made in suit No. 8 of 1906. If the plaintiff is declared the beneficial owner of the mortgage, the mortgagor-defendants would be entitled in the event of the compromise being held not binding on the plaintiff to plead all their defences to the claim as originally made. They would be entitled to urge all those contentions for the reduction of the claim which must have been submitted to the District Court at Poona in support of the compromise. Besides this, other defences are open to him. They would say the plaintiff knew of the intended compromise before the decree was taken and took no steps to prevent the decree being passed. On the 30th of January 1907 she was informed of the terms of the compromise and told to take what steps she liked (see exhibit B). The decree was not taken till the 19th of February 1907 and she took no steps to intervene. These defendants would also raise the question whether the plaintiff is entitled to re-open the question in this suit, the executors of this original mortgagee in whom the legal estate had always remained having executed a reconveyance of the mortgaged premises before the plaintiff filed this suit. If the plaintiff succeeded in her main contention against the first defendant and then is allowed to proceed with the second branch of her case against the 2nd set of defendants, further complications would arise because it appears from the written statement of the first defendant that on the property being reconveyed to them defendants 2 to 8 have sold the same and the purchaser whose title would be jeopardised is not a party to the suit.

The first defendant has not the smallest interest in any single one of the questions that would arise between the plaintiff and

It will thus be seen that the questions arising between the plaintiff and the first defendant and the questions arising between the plaintiff and second set of defendants are totally distinct and different. There is no common question of fact or law which affects all the first eight defendants.

Then take the case of the defendants 9 and 10. What is the plaintiff's cause of action against them? They were formal parties to the first suit No. 8 of 1906 because they had not assigned or transferred the mortgage to the plaintiff in that suit. They executed a reconveyance when the person whom they believed to be the beneficial owner of the mortgage debt asked them to do. It is difficult to conceive what the plaintiff's cause of action is against this the third set of defendants. I searched in vain through her plaint to find out what her cause of action is against these defendants and what relief she claims against them. The only possible complaint that she could make against them is that they joined in reconveying the property.

It will thus be seen that all the defendants in the suit are not jointly liable in each and all of the causes of action united in this suit nor are they all jointly raised by this litigation.

It seems to me that in this suit the plaintiff has distinctly combined at least two separate suits. It also appears to me that she has made her claim against defendants other than the first defendant much too prematurely. There is no dispute that the first defendant has, as a matter of fact, been adopted by Shanker's widow Girjabai. He is to all intents and purposes the owner of all Shanker's property till such time as his adoption is set aside and declared invalid by a Court of law competent to try that question. Till she succeeds in establishing the invalidity of the adoption of the first defendant Vithal, she has no right to sue the other defendants in respect of property to which her right is not established. All the property left by Shanker is vested at present in the first defendant and the plaintiff has launched this litigation against the other defendants without having established her right to the property in respect of which she sues. The suit as constituted must in my opinion cause considerable embarrassment to the different defendants.

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Under these circumstances I have no option but to hold that the plaintiff has clearly misjoined in this suit both parties and causes of action. I would like to say here that even if the conclusion to which I have arrived had been different, I would still have held that the causes of action joined in this suit could not conveniently be tried or disposed of together and considered what would have been the right order to make under the discretion vested in the Court by rule 6 of Order II.

Having, however, come to the conclusion that the suit as constituted is bad by reason of misjoinder of parties and of causes of action I find the 5th issue in the affirmative.

I will give the plaintiff the option of electing against which defendant or defendants she proposes to go on with the suit and when she has made her election, I will proceed to consider my decision on the 4th issue as to whether this Court has jurisdiction to entertain the suit against the particular defendant or defendants against whom the plaintiff elects to proceed.

Attorneys for the plaintiff:—*Messrs. Chitnis & Co.*

Attorneys for the 1st defendant:—*Messrs. Dikshit, Dhunjisha and Sunderdas.*

B N. L.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

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 July 26.

PERURI SURYANARAYAN AND COMPANY, PLAINTIFFS, v GULLA-
 PUDI CHINNA NARSINGHAM AND ANOTHER, DEFENDANTS.

*Arbitration—Reference by parties to a suit—Application to stay
 proceedings—Arbitration Act (IX of 1899), section 19.*

Section 19 of the Arbitration Act only applies where there has been a submission to arbitration before the commencement of legal proceedings.

Ramjidas Poddar v. House ⁽¹⁾, followed.

THIS matter was heard in Chambers. The plaintiffs on the 17th September 1908 filed a suit as a Short Cause against the

* Original Suit No. 783 of 1908.

⁽¹⁾ (1907) 85 Cal. 199.

defendants to recover Rs. 6,377-14-0 with interest due on certain money transactions. A warrant for attachment before judgment was obtained by the plaintiffs and attachment levied, but, later, as the result of an agreement between the parties to refer their dispute to arbitration, a consent order was taken discharging the warrant. Subsequently, however, the defendants, contending that the plaintiffs had delayed in raising the attachment and that therefore the agreement to refer was at an end, refused to proceed to arbitration. The suit came on for hearing in due course, but was adjourned from time to time by consent. Eventually the plaintiffs applied by petition for a stay of the legal proceedings, and notice was issued to the defendants on the 1st April 1909.

Robertson for the respondents (defendants) to show cause.

Strangman (Advocate-General) for the petitioners (plaintiffs).

MACLEOD, J.—The question in this notice is whether when the parties to a suit agree to refer the questions in dispute to arbitration, one of the parties can apply to the Court under section 19 of the Arbitration Act for stay of proceedings.

It is contended by Mr. Robertson for the respondents that by section 2 of the Act it is clear that the Act only deals with cases where references to Arbitration are made before proceedings are taken and, therefore, it would follow that unless there has been a submission to arbitration before the suit is filed, an application for stay of proceedings cannot be made under section 19. This is supported by the decision of the Appeal Court in Calcutta in the case of *Ramjidas Poddar v. Howse*⁽¹⁾, in which the learned judges were decidedly of opinion that the Act only applied to cases where there had been a submission to arbitration before the commencement of legal proceedings. That case, of course, is entitled to the very best consideration I can give it. But apart from that case, I should certainly be inclined to decide that Mr. Robertson's argument is correct and that the Act only applies to cases where references are made before proceedings are taken. No doubt, it

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(1) (1907) 35 Cal. 199.

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would have been possible for the Legislature to legislate so that the Act should apply to cases where a reference is made after proceedings have been taken, but it is clear that they did not do so when they framed the Arbitration Act of 1899. Section 19 seems to me perfectly clear. It says:

"Where any party to a submission to which this Act applies or any person claiming under him, commences any legal proceedings" &c.

Therefore, such a person must be a party to a submission before the commencement of the proceedings. In this case it is admitted that the submission was made after the proceedings commenced, and, therefore, it is not competent for any party to apply under section 19 to stay the proceedings.

Attorneys for the applicants: *Messrs. Jamshedji, Rustomji and Devidas.*

Attorneys for the opponents: *Messrs. Matubhai, Jamietram and Madan.*

K. M. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batehlor.

1909.

July 30.

SHAPURJI HORMASJI HARVER, APPELLANT AND DEFENDANT, v.
MONOSSEH JACOB MONOSSEH, RESPONDENT AND PLAINTIFF.*

Costs—Guardian ad litem of a lunatic—Personal liability of guardian to pay costs incurred by unnecessary appeal.

The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when a guardian *ad litem* takes it upon himself to appeal against a decree, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem*.

* Original Suit No. 406 of 1907.

Appeal No. 53 of 1908.

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THIS was an application arising out of an appeal filed by the guardian *ad litem* of a lunatic against a decision of Mr. Justice Macleod. The appeal was dismissed and the respondent awarded his costs out of the estate of the lunatic, the question of the costs of the appellant being reserved. The present application was made by the guardian to have his costs paid out of the estate.

Padshah appeared for the applicant.

Joshi appeared for the committee of the property of the lunatic, and submitted himself to the order of the Court.

SCOTT, C. J.—This is an application on behalf of the guardian *ad litem* of the defendant in this suit who is an adjudged lunatic, for an order allowing him to have his costs of an appeal filed by him in the suit out of the estate of the lunatic.

The suit was originally filed by the plaintiff against the defendant upon a mortgage and deed of further charge and in consequence of the defendant's state of mind the present applicant was appointed his guardian *ad litem*. The principal defence raised in the suit was that the defendant on the dates of the execution of the documents sued on was of unsound mind and that therefore he was not liable for the amount advanced by the plaintiff on those occasions. The suit was heard before Mr. Justice Macleod at great length and that learned Judge delivered a very careful judgment. The suit was dismissed but the guardian *ad litem* was allowed his costs out of the estate. He was not satisfied, however, with the decision and filed an appeal against it. The appeal was argued before us and turned entirely upon the facts of the case and was dismissed. Shortly after the appeal had been filed, committees of the person and property of the defendant were appointed. The committee of the property is on this application represented by counsel.

It is a fact, although our judgment will not be influenced by that fact, that the applicant was personally interested in defeating the claim of the plaintiff, because he is the brother of the defendant and in the event of the defendant's death will succeed to a portion of his property under the Parsi Law. The guardian *ad litem* appointed by the Court usually gets his costs out of the

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estate of the defendant whom he represents if he does not recover them from the plaintiff; but when the guardian *ad litem* takes upon himself to appeal against a decree passed against the lunatic, whom he represents, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem*.

Now the rule is that if proceedings instituted by the next friend are unnecessary or improper, and the next friend might, with reasonable care, have known them to be so, he must pay the costs personally. See Simpson on Infants, (2nd. Edn.), p. 484. The same rule has been laid down with regard to trustees who take upon themselves to appeal against the decision of the Court. In *re Walters* ⁽¹⁾ the Court of Appeal in England refused to allow trustees their costs of the appeal out of a fund and ordered them to pay the costs. Bowen, L. J., said that in his opinion when there was an unsuccessful appeal relating to a fund, the appellant ought to be ordered to pay the costs; otherwise there would be a premium upon unsuccessful appeals. Fry, L. J., concurred and said:

"The trustees were sufficiently protected by the order of the Court below, and there was no ground for their coming to this Court"

Similarly in *Ex parte Russell* ⁽²⁾, Sir George Jessel said:

"In the County Court the trustees might fairly say, 'We want a decision about the settlement,' but, having had a decision, if they choose to appeal, they must take the consequences"

They were ordered personally to pay the costs of the appeal.

Here, however, it is said that the guardian *ad litem* filed this appeal by the advice of his solicitor and counsel. That, however, is no reason for asking the Court to lessen the lunatic's funds by an order for payment of his costs in the unsuccessful appeal.

In *In re Beddoe. Downes v. Cottam* ⁽³⁾ Lindley, L. J., said:

"But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on Counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to

(1) (1890) 34 S. J. 564.

(2) (1882) 19 Ch. D. 588 at p. 602.

(3) [1893] 1 Ch. 547 at p. 557.

charge them against his *costs que trust* unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate."

Now, if the guardian *ad litem* in the present case had been in serious doubt as to whether he ought not to file the appeal, he could have adopted the course, which was in fact adopted a month later, of obtaining an order of the Court for the appointment of a committee of the property. That committee could then have applied to the Court for advice as to whether an appeal should be filed or not; and the guardian *ad litem* could have filed the appeal, if the Court thought it was a proper case, with the sanction of the committee of the property. We do not think, however, that this is a case in which the Court could have sanctioned the appeal, for the appeal had nothing to recommend it. The guardian *ad litem* having chosen upon his own responsibility to file this appeal, must take the consequences to the extent of having to bear the costs of the appeal incurred by his authority.

We are not asked on behalf of the lunatic to throw the costs of the successful respondent upon the guardian *ad litem*: so with regard to them, we make no order.

We refuse the application.

The applicant must pay the costs of the committee of the property on this application.

Application refused.

Attorneys for the guardian: *Messrs. Jehangir, Gulabkhoy & Billimoria.*

Attorneys for the committee: *Messrs. Aideshir, Hormasji, Dinshaw & Co.*

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CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.

EMPEROR v. GANESH BALVANT MODAK *

October 6.

High Court—Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898), section 435—Indian Penal Code (Act XLV of 1860), sections 511, 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact

It is the settled practice of the High Court of Bombay to refuse to interfere, in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the mis-construction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence.

Queen-Empress v. Shekh Sahib Badrudin⁽¹⁾; *Queen-Empress v. Mahomad Husan*⁽²⁾; and *Queen-Empress v. Chagan Dayaram*⁽³⁾, followed.

Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.

An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article. It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public.

In cases of sedition, the question of intention is one of fact.

APPLICATION for revision under section 435 of the Criminal Procedure Code, against conviction and sentence passed by A. H. S. Astou, Chief Presidency Magistrate of Bombay.

The accused was the manager of a newspaper selling agency called the Vartman Agency. This Vartman Agency was the sole agent for sale in India of a fortnightly periodical styled "the Swaraj," which was printed and published in London.

* Criminal Application for Revision No. 379 of 1909.

(1) (1883) 8 Bom 197.

(2) (1886) Unrep. Cl. Cas 244

(3) (1890) 14 Bom. 381.

One of the issues of the periodical contained an article entitled "The Ætiology of the Bomb in Bengal," which was charged as seditious within the meaning of section 124A of the Indian Penal Code.

It appeared that the accused received by post an advance copy of the issue of the periodical in question. He advertised the same and also reviewed it in a daily newspaper called the *Rashtra Mat*, which was published under his management. The sale copies of the issue were later on received by him by a steamer parcel and all of them were sold by the Vartman Agency.

The accused was under these circumstances charged with having published the seditious article in India, an offence punishable under section 124A of the Indian Penal Code, 1860. He was convicted of the offence and sentenced to suffer one month's simple imprisonment.

The accused applied to the High Court.

Baptista, with *V. F. Bhadhamkar* and *B. V. Desai*, for the accused.

Strangman (Advocate-General) instructed by *L. F. Nicholson* (Public Prosecutor), for the Crown.

CHANDAVARKAR, J. :—This is an application by Ganesh Balvant Modak for revision of the conviction recorded against and sentence passed upon him by the Chief Presidency Magistrate of Bombay under section 124A of the Indian Penal Code. The learned Magistrate has held that the petitioner has been guilty of the offence of attempting to excite feelings of disaffection towards the Government established by law in British India by the sale of copies of a periodical called the *Swaraj* containing an article headed "The Ætiology of the Bomb in Bengal," which is seditious within the meaning of the section above mentioned.

This finding of the Magistrate has been assailed before us on two grounds: first, that there has been no publication by the petitioner of the periodical in question, containing the article charged as seditious, and, secondly, that the article itself is not seditious within the meaning of section 124A of the Indian Penal Code.

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It is to be remarked at the outset that both the question of publication and the question of the seditious character of the article are questions of fact, which have to be determined on the evidence and by the light of surrounding circumstances. On these questions of fact, the learned Magistrate has recorded his findings with his reasons therefor in his judgment. What we are asked by the learned counsel for the petitioner to do is to appreciate the evidence and revise the Magistrate's findings of fact. But it has been the settled practice of this Court to refuse to interfere, in the exercise of our revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the misconstruction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence. *Queen-Empress v. Shehh Sahib Badrudin*⁽¹⁾; *Queen-Empress v. Mahomad Husan*⁽²⁾; *Queen-Empress v. Ohagan Dayaram*⁽³⁾.

On the question of publication, it is contended by the learned counsel for the petitioner that the facts proved do not constitute publication. The facts relied upon by him are these:—The petitioner received an advance copy of the *Swaraj* from London on the 2nd of July by post. The bulk of the copies of the periodical sent for sale was delivered to him on the 26th of July, and he sold a number of them on that day. But from the 2nd of July to the 26th of that month, the petitioner was occupied with other business than that of looking after the interests of the *Swaraj*, and he had no time to read the article in it charged as seditious.

These, however, are not all the facts. There is evidence on the record to show that the petitioner is sole agent for the periodical for the whole of India, that he took great interest in it (exhibits S, Q. and F.) and that on the 15th of May 1909, he had written to the proprietor and editor of the periodical in London, asking for an advance copy by post that he might know what to expect and make use of his own daily paper in Bombay, the *Rashtra Mat*, for the special advertisement of the

(1) (1888) 8 Bom. 197.

(2) (1886) Unrep. Cr. C. 244.

(3) (1890) 14 Bom. 331.

Swaraj. It is admitted that an advance copy was sent and that the *Swaraj* was advertised in the *Rashtra Mat*, of which the petitioner was manager. Further, on the 10th of July, an article had appeared in the *Rashtra Mat* noticing the *Swaraj* and its contents. Upon all this evidence it was competent for the Magistrate to find as a fact that the accused had read the article and knew its contents and character before the sale of the copies. It is conceded by the petitioner's counsel that, under the circumstances of the case, the *onus* lay on the petitioner to prove that he had not read the article. That *onus*, the Magistrate finds, he has not discharged. No error of law has been pointed out to us to warrant our interference with the Magistrate's conclusion of fact on this question.

But it is urged that there was no publication, because the prosecution has not led any evidence to prove that any of the buyers had read the article. In support of this contention, the petitioner's counsel, Mr. Baptista, relies upon a passage from Odgers on Libel, where it is said that an attempt to libel is not actionable unless it is effectual. That is, there must be a publication in fact. "That the third person had the opportunity of reading the libel is not sufficient, if the Jury are satisfied that he did not in fact avail himself thereof, even though it is clear that the defendant desired and intended publication." But, as the passage and the chapter in which it occurs as also the cases cited in illustration clearly show, the law stated by Dr. Odgers is applicable to actions for libel, not to criminal prosecutions. No suit can lie for damages for an ineffectual attempt to libel, because, the attempt failing, there is no injury, and in actions for libel "proved or presumed injury to reputation" is the cause of action. (Pollock on Torts, p. 245, 6th edition.) It is otherwise in criminal law. An attempt to commit an offence is under our Penal Code punishable. All that is necessary to constitute such an attempt is some external act, something tangible and ostensible, of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted. In the present case the attempt was for the purposes of law complete when the petitioner sold the copies. It was

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none the less an attempt, though something external to him happened which prevented a perusal of the article by the buyers or any other member of the public.

The next question is whether the article is seditious within the meaning of section 124A of the Indian Penal Code. That depends on whether the article was intended to bring the Government into hatred or contempt. The question of intention in such cases is one of fact. As pointed out by Sargent, C. J., in *Dyami Naik v. Lingappa*⁽¹⁾, relying on a dictum of Lopes, J., in *Northcote v. Doughty*⁽²⁾, where, on the construction of a document by the light of surrounding circumstances, the question is entirely one of intention, it becomes "a simple question of fact as to which the decision of the Court below is conclusive." Here it was a question *quo animo* the article on "The Etymology of the Bomb in Bengal" was written. As such it resolved itself into a mere question of fact, on which the Magistrate's finding must be treated by this Court as conclusive, according to its settled practice in the exercise of its revisional jurisdiction, unless some error of law vitiated that finding. No such error has been so much as hinted at by Mr. Baptista, the learned counsel for the petitioner, in his full and careful argument.

But I do not wish to leave this part of the case at that point. Owing to the importance of the question, we allowed Mr. Baptista to argue the case as if it were an appeal and not a mere revisional application. I have read the article most carefully with a view to form my own judgment as to its character. I can come to no other conclusion than that its object and intention is to bring the Government contemplated by section 124A into hatred and contempt. Mr. Baptista's contention is that, though the writer has here and there used unhappy expressions, and language which is to be regretted, yet his intention, upon the whole, is to point out to Government that bombs and assassinations, described as "the outlandish methods of the West," have come into existence in what the writer regards as this land of a spiritual people, because of cer-

(1) (1889) P. J. p. 37.

(2) (1879) 4 C. P. Div., 385.

tain reactionary policy and repressive measures of Government; and that the writer comments on that policy and those measures with a view to secure their alteration by Government. But this contention ignores the leading ideas and the prominent *innuendoes* of the article. The article begins with the statement that the people have become helpless against their "oppressor or opponent," i. e., the Government; it contrasts the European as "material, gross, mean, degrading," with the people of this country as being endowed with instincts "emotional, spiritual, refined and uplifting." The Government is charged with, on the one hand, bringing into existence "the scoundrel patriot," "the self-seeking loyalist who sells his conscience and his country for a post under the Government or a retainer in Crown cases or for the mere refined bribe of an honorary title," and with, on the other, either deporting "the Nationalist" or compelling him by its policy to go into "exile." To petition Government for any relief or right is practically represented as "old mendicancy." The insinuation is that petitioning Government for any right or relief is not only useless but degrading. The Executive is charged with having first resorted to "excesses" "either to terrorise the people or to exasperate them to any acts of counter-violence"; and when that failed, with having taken no action to protect Hindus against Mahomedan lawlessness, out of "secret sympathy" for "the acts of Moslem rowdyism." All this, according to the writer, steeped the people in a sense of helplessness, with the result that the newspaper *Sandhya* advised the people to resort to the use of the bomb for self-protection. The writer characterises that advice as "a lawful appeal," and winds up with the observation that, when the *Sandhya's* advice was followed and the bomb appeared, "it was a great achievement for people who had never received any regular training."

The intention and meaning of all this is obvious. In short, the Government, according to the writer, is composed of a race which is materialistic and mean; it has proved the people's oppressor; it is demoralising them by turning out scoundrel

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patriots; it is irritating them by repressive measures; it has exasperated them to acts of violence; it has secretly allowed Mahomedan "rowdies" to attack Hindus; and all this has served to bring the bomb into existence. The rise of the bomb is represented by the writer as "lawful," and "not criminal" under the state of things portrayed by him. Throughout the attempt is to create the impression that the Government exists for the satisfaction of its own cupidity, and has not a single redeeming feature. Even the peace of the country, enjoyed under the Government, is referred to ironically. Such writing cannot but have been meant by the writer to bring the Government into contempt and hatred and to excite feelings of disaffection against it. I agree with the learned Magistrate that the article is seditious within the meaning of section 124A of the Indian Penal Code.

Accordingly the conviction and sentence must be confirmed and the rule discharged.

HEATON, J.:—This is a revisional [application; it has been argued at a great length, and all that is to be said has been said on both sides. What we have to decide is whether there has been any miscarriage of justice. I do not think there has. The article has been read and commented on, and I have read it again very carefully. I summarize it very briefly by saying that the writer tells us that the grievances of the people in Bengal are so pressing; that the Government is so bad; that the chance of redress of their grievances is so remote, that the people in self-defence have been driven to the use of the bomb. If that is a correct description of this article, and it seems to me that it is absolutely correct, I can only infer that the writer is animated by the most virulent hatred of the Government in Bengal and that it was his object to spread that feeling of hatred to others. That brings the article and the writer of the article within the terms of section 124A of the Indian Penal Code. We only have to consider whether the distributor (the accused) also comes within that section. There is no doubt that he did distribute this article; and if he did so consciously, consciously, that is, of the nature and purport of this article,

then he also comes within this section. I can find no good reason for supposing that the Magistrate has not correctly decided that the accused had read the article; that he was in a position to appreciate its meaning and that he did consciously take part in disseminating that wicked and seditious publication. Therefore I concur that the conviction and sentence should be confirmed.

Application rejected.

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APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Chandavarkar
and Mr. Justice Batchelor.*

DAYALDAS LALDAS WANI (ORIGINAL DEFENDANT NO. 2), APPELLANT,
v. SAVITRIBAI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Hindu Law—Succession—Stridhan—Anvadhya—Sons and daughters
succeed equally—Among daughters unmarried have preference—Mayukha.*

A Hindu female, governed by the Mayukha, died leaving property which she inherited from her father, under a deed of gift subsequent to her marriage. She left her surviving three daughters and one son. A dispute as to succession having arisen:—

Held, that the property being *anvadhya* stridhan, should be divided equally among the son and daughters: with this difference, however, as to the latter, that the unmarried should have preference over the married.

Ashabai v. Haji Tyeb Haji Rahimtulla(1) and *Sitabai v. Wasantrao*(2), followed.

SECOND appeal from the decision of C. C. Dutt, Joint Judge of Thana, confirming the decree passed by S. A. Gupte, Subordinate Judge at Dahadu.

Suit to recover possession of property.

The property in question belonged to a Hindu female, Varubai, who received it from her father by way of gift subsequent to her marriage. She had three daughters and one son.

* Second Appeal No. 665 of 1907.

(1) (1882) 9 Bom. 115 at p. 126.

(2) (1901) 3 Bom. L. R. 201.

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The parties were governed by the Mayukha law.

Varubai died in 1894. Her son Dinkar died in 1903. After Dinkar's death, his widow leased the property to defendant No. 1 for a term of 51 years, in satisfaction of a debt due by Dinkar. A little later, one Chhotalal, another creditor of Dinkar, obtained a money-decree against Dinkar and in execution of that decree had the property sold to defendant No. 2.

Varubai's daughters then filed a suit to recover possession of the property, alleging that they were the preferential heirs to the same. Their claim was decreed by the Subordinate Judge, who remarked as follows:—

"Varubai received the property in gift from her father. It is, therefore, Saudayik, and the daughters of Varubai, that is the present plaintiffs, are the preferential heirs (*Manilal v. Bai Renua*, I. L. R. 17 Bom. 758)."

This decree was confirmed by the lower appellate Court, on the following grounds:—

"In 17 Bom. 758, Telang, J., after examining all the older cases has laid down that in the case of stridhan proper the daughter has a preferential right over a son, though it is not so in the case of improper son. The gift here is stridhan proper; and according to 17 Bom. 758, there is no doubt that the daughters are the preferential heirs and the Subordinate Judge's order is correct. The appellant says that this view is not in accordance with the ruling in *Sitabai v. Wasantrao* (3 Bom. L. R. 201). But this latter case deals with the difference between the stridhan inherited from the father's family and stridhan inherited from the husband's family and lays down that there is no difference between these as far as the question of inheritance is concerned. But there is no such clear mention of property received by gift of the sort we have to deal with here. The opinion of Telang, J., in 17 Bombay is on the other hand clear on this point. As to the applicability of Mayukha there is no doubt for the plaintiffs have not shown that they have migrated from some other tract where the Mitakshara applies. However, as I have held that the daughters are preferential heirs according to the Mayukha in this case, it does not much matter whether Mayukha or Mitakshara applies. According to the latter, the appellant admits that the daughters would be the heirs of Varubai."

The defendant No 2 appealed to the High Court.

G. S. Rao, for the appellant.—The property in question is the *Anvadhya* stridhan of Varubai. The succession to such species of stridhan is laid down in the Vyavahara Mayukha (Chap. IV, sec. X, pl. 13, Mandlik, p. 95).

If Manu's text be interpreted literally, then the *Anvadheya* stridhan descends to sons and daughters equally. Mitakshara's gloss upon it, however, is that sons inherit only in default of daughters. Nilkantha does not accept the Mitakshara view, for he says that in the opinion of others (परेतु) (*paretu*) both sons and daughters inherit this species of stridhan equally. The use of the word "*paretu*" indicates that Nilkantha differed from the Mitakshara view. The word is used generally when the writer desires to indicate his dissent from writers of established repute. See Nagoji Bhatt's *Paribhashendu Shekhara*, Dr. Kielhorn's Translation, p. 299.

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The very next placitum shows how stridhan is to be divided among the daughters. If there be both an unmarried and married daughters, the former takes a share equal to that of a son, while the latter are to receive a trifling portion of the inheritance as a mere token of respect. This placitum would be meaningless if the Mayukha were taken as adopting the view of the Mitakshara.

The Mitakshara makes no distinction between the technical and non-technical stridhan for purposes of inheritance. It lays down one simple rule of devolution for all kinds of stridhan except Shulka. The Mayukha does not adopt the rule. It distinguishes between the technical and non-technical stridhan and provides for separate rules of succession for each. It adopts the Mitakshara rule so far as the technical stridhan is concerned, with this exception that the *Anvadheya* and *Prittidatta* descend to sons and daughters alike. But the non-technical stridhan goes to the male issue in preference to the female issue: *Manilal Rewadat v. Bai Rewa*⁽¹⁾.

The text-writers on Hindu law have accepted the same interpretation of the Mayukha view. See West and Bühler, p. 145 (3rd Edn.); Bannerjee on Stridhan, p. 370 (2nd Edn.); Bhat-tacharya's Hindu Law, p. 583 (2nd Edn.); Ghose's Hindu Law, p. 281 (2nd Edn.); Mayne's Hindu Law, p. 898, section 671 (7th Edn.).

(1) (1892) 17 Bom. 758.

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The Mayukha agrees in this respect with other texts: see Smṛiti Chandrika, pp. 125, 126; Vira Mitrodaya, pp. 228, 229; and Vivada Chintamani, pp. 266, 267.

The decided cases also support my contention, see *Ashabai v. Haji Tyeb Haji Rahimtulla*⁽¹⁾; and *Sitabai v. Wasantrao*⁽²⁾.

K. N. Koyajee, for the respondent —The two Bombay decisions cited by the other side were by single Judge and full arguments on the present point do not seem to have been advanced.

I submit that Nilkantha means to lay down in the Mayukha that succession to Anvadheya stridhan goes to the daughters alone whether there be sons or not, and if Nilkantha has not himself expressed any definite opinion on the point, the opinion of the Mitakshara which he quotes in full and from which he does not show an express dissent, must prevail. See *Vasudev Bhat v. Venkatesh Sanbhav*⁽³⁾ and *Krishnaji Vyanktesh v. Pandurang*⁽⁴⁾.

The expression "*paretu*" cannot import dissent. Dr. Kiehlhorn's remark in parenthesis relied on by the other side cannot be accepted as a general rule. I submit that the very fact that the Mitakshara view is cited and the contrary view is briefly alluded to without naming the authors or without any concurrence, shows that Nilkantha meant to adopt the Mitakshara view.

[CHANDAVARKAR, J. :—The text as to the further distinction between married and unmarried daughters which is ascribed to Manu in Mandlik at p. 95, is not to be found in Manu.]

The author of the text seems to be Brihaspati and not Manu. Thus, Nilkantha quotes Brihaspati's text and explains it as meaning that the daughter gets the share of a son. I submit that the expression "*tadamskini putrasamamskini*" does not mean that the daughter takes an equal share *along with* the son, but it only means that she takes a share which a son would have taken. The preference between married and unmarried daughters would only be intelligible if sons are excluded.

The remarks of Telang, J., at the end of his judgment in *Manilal Rewadat v. Bai Rewa*⁽⁵⁾ also support my contention.

(1) (1882) 9 Bom. 115 at p. 126.

(3) (1873) 10 Bom. H. C. R. 139.

(2) (1901) 3 Bom. L. R. 201.

(4) (1875) 12 Bom. H. C. R. 65.

(5) (1892) 17 Bom. 758.

CHANDAVARKAR, J.:—The facts, material for the purposes of the question of Hindu law argued before us, are shortly these.

One Varubai died possessed of property and left her surviving a son, by name Dinkar, and three daughters. The property in dispute formed the *anvadhya stridhan* of Varubai, she having received it in gift from her father after her marriage. *

The daughters of Varubai, who are respondents before us, were plaintiffs in the suit, which has led to this second appeal. They claimed the property as sole heirs of their mother. The appellant before us asserted his right to it under a title derived at a Court sale from Varubai's son Dinkar. His case was that Dinkar was the sole heir of Varubai.

Both the Courts below have awarded the respondents' claim, holding that they were the heirs of Varubai.

The question argued before us is, whether the son and the daughters of Varubai take the property as joint heirs of their deceased mother, or whether the daughters alone take it as heirs in preference to the son.

It was held by Green, J, in *Hurry Shankar v. Krishnarao*⁽¹⁾ that the term *anvadhya* applied only to a gift to a woman from her husband or his family subsequent to her marriage. In *Ashabai v. Haji Tyeb Haji Rahimtulla*⁽²⁾ Sargent, C. J., sitting as a single Judge, held that sons and daughters were all entitled as heirs to share equally in the *anvadhya stridhan* of their deceased mother. This latter decision was followed by the late Chief Justice of this Court, Jenkins, C. J., also sitting as a single Judge, in *Sitabai v. Wasantrao*⁽³⁾, where he pointed out that, in limiting the meaning of *anvadhya stridhan* to a gift made to a woman by her husband or his family after her marriage, Green, J., had been misled by the wrong rendering by Borradaile of the passage in the Mayukha dealing with the question of succession to that *stridhan*. The view taken of the Mayukha law in these two decisions is the same as that taken by West and Bühler in their Digest (page 145, 3rd Edition), by

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(1) Suit No. 84 of 1876, Unrep. Note The Editor has not been able to verify this reference as the proceedings in this suit could not be found.

(2) (1882) 9 Bom. 115 at p. 126.

(3) (1901) 3 Bom. L R. 201.

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Sir Gurudas Banerjee in his Tagore Law Lectures on the Hindu Law of Marriage and Stridhan (page 371, 2nd Edition), and by Mr. Bhattacharya in his "Commentaries on Hindu Law" (page 583, Second Edition).

It is contended for the respondents that the decisions of Sargent, C. J., and Jenkins, C. J., rest upon a misapprehension of the passage in the Mayukha, which deals with the question of succession to *anvadhya stridhan*; that Nilakantha does not state his own opinion on the question whether sons and daughters share equally or whether the daughters take the property to the exclusion of the sons; but that he merely states the opinion of the Mitakshara and that of others who differ from it. Under these circumstances, it is urged, we must apply to the case the law of the Mitakshara, on the established principle of this Court, enunciated in *Vasudev Bhat v Venkatesh Sanbhav*⁽¹⁾ and *Krishnaji Vyankatesh v. Pandurang*⁽²⁾, that, wherever Nilakantha expresses no opinion of his own, conformity with the Mitakshara should be aimed at, as far as consistency will allow, in cases governed by the law of the Mayukha.

This contention is founded upon a misconception of the import of the language used by Nilakantha in dealing with the question of succession to *anvadhya stridhan* (a gift subsequent to marriage). He first mentions the opinion of the Mitakshara; then he states the contrary opinion in the following terms:—

"Others (however) say that, in the case of *anvadhya* and a gift through affection, the association of daughters and sons is independently laid down (by this text)." (Mandlik's Hindu Law, page 95).

In urging before us that in this passage Nilakantha does no more than express the opinion of those who differ from the Mitakshara without stating his own view, the respondent's pleader loses sight of the fact that the form of expression used in the passage is not uncommonly employed by an author in Sanskrit when he means to state his own view on a point under discussion. He would first state the opinion of the author from whom he means to differ, and then express his own opinion by

⁽¹⁾ (1873) 10 Bom. H. C. R. 139.

⁽²⁾ (1875) 12 Bom. H. C. R. 65.

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using such language as "others, however, say"—(*pare tu** or *anye tu*, both of which have the same meaning in Sanskrit). Another mode of expressing dissent from the opinion of an author is to state that opinion and say: "Some, however, say," (*kechit tu*). Of this form of expression, however, it must be observed that, more than the other form, it depends on the context whether it should be interpreted in the same sense as the expression—"Others, however, say," because the word "others" is *pramāṇic* more comprehensive than the word "some." There is yet a third mode. Where an author differs from older authors on a point, he states the opinion of the latter as that of "ancient authors" and expresses his dissent in these words:—"Modern authors" (*arvachaka* or *navyaka*) "however, say". By "modern" the writer is presumed to refer to himself as one falling in the category of authors later than the ancient.

The reason why this indirect form of language is not uncommonly used to express dissent is that it is considered unbecoming and presumptuous on the part of a writer to adopt such expressions as "I think so," or "I say so," or "I am of opinion," especially when he is differing from another author of repute and recognised authority. It is regarded as a mark of culture and scholarship for an author to express his own opinion modestly and humbly, in differing from another author. When he states the latter's opinion and then says "others, however, take a different view," by "others" he implies his "own humble self."

This mode of expressing dissent is employed, for instance, by Nagoji Bhatta in his *Paribhashendushekhara* (page 106, last line: Kielhorn's Edition), and his *Shabdendushekhara*. It is adopted also by Jagannatha in his *Rasagangadhara* (Nirnaya Sagara Edition, page 276 and page 501). Among Sanskrit scholiasts it is a rule of construction that, when these forms of expression occur in a work, they should be interpreted, generally speaking, as meaning that the author who uses them intends thereby to

*The following note is by the distinguished Orientalist, Dr. R. G. Bhandarkar:—

"When the opinion of an author is quoted by his name and afterwards another opinion is given and introduced by the words *pare tu*, the usual way of understanding is that this last is the opinion of the author himself."

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represent that the dissenting opinion is either his own or is shared by him.

Nilakantha, therefore, in the passage above quoted from the Mayukha, may be fairly presumed to have dissented from the opinion of the Mitakshara and to have stated it as his own opinion that both sons and daughters are joint heirs to the *anvalheya stridhan* of a woman.

This interpretation of Nilakantha's meaning is confirmed by what follows immediately after the passage quoted above from the Mayukha. He proceeds to point out a distinction with reference to the daughters. As to them he says, the unmarried come in as heirs before the married. In support of that distinction he quotes a text of Manu which provides :—

"*Stridhan* (woman's property) goes to her children, (for) the daughter is a sharer thereof, provided she be not given away (in marriage)." (Mandlik's Hindu Law, page 95, lines 33 to 36).

Having quoted this text, Nilakantha explains what Manu means by the expression: "the daughter is a sharer thereof," (*tadamshini*). It means, says Nilakantha, that the daughter becomes "the receiver of a share equal to (that of the) son." This explanation would be out of place, if Nilakantha meant to accept the opinion of the Mitakshara that the sons and daughters do not inherit jointly but that the daughters come in in the line of heirs first and that the sons take only in default of them. It is because the son is, in Nilakantha's view, a sharer with the daughter that he says that the daughter's share is equal to the son's. That is why he concludes his treatment of the subject by citing Katyayana's text, which provides that "sisters having husbands should share with brothers," (Mandlik, page 96, line 2).

These considerations, coupled with the fact that, in dealing with the question of succession to *stridhan* property, Nilakantha treats the two forms of technical *stridhan*, known respectively as *anvalheya* (a gift subsequent) and *pṛiti dattu* (gift through affection) separately from the other technical forms, make it clear, beyond doubt, that, in his opinion, daughters and sons are joint heirs to the former and share equally.

It is, however, argued for the respondents that it cannot be so because, later on, after pointing out on the strength of a text of Katyayana that, in default of daughters and their issue, "the sons, grandsons and the rest" (of the deceased) should succeed, Nilakantha remarks: "This right (of inheritance) of daughters and the rest in the mother's property exists only in (respect of) the *adhyagni*, *adhyarukhanika*, and other aforesaid (kinds of the) technical *stridhan*." (Mandlik, page, 97, lines 7 to 11). This remark is made merely for the purpose of emphasising the distinction which, in Nilakantha's opinion, exists between *stridhan* technically so called and other kinds of *stridhan*. He says that the right of daughters to succeed to their mother's property exists only as to technical *stridhan*. That does not mean that the right is exclusive of the right of sons in the case of every kind of technical *stridhan* without exception. The daughter succeeds to her mother's *stridhan*, whether she inherits it jointly with a son or to his exclusion. In short, the purpose of Nilakantha's observation is no more than to show that a son excludes the daughter in all cases except technical *stridhan*. It does not follow from that that the son does not share equally with the daughter in certain kinds of technical *stridhan*, such as a gift subsequent (*anvadhya*) and a gift through affection (*priti datto*).

The result is that, as held in *Ashabai v. Haji Tyeb Haji Rahim-tulla*⁽¹⁾ by Sargent, C. J., and in *Sitabai v. Wasantrao Nana Moroba*⁽²⁾ by Jenkins, C. J., under the law of the Mayukha, when a Hindu woman dies possessed of *stridhan* property called *anvadhya* (a gift subsequent to marriage), and the claimants to that property are her son and daughters, these all become entitled to share the property equally as heirs, with this difference, however, as to daughters, that the unmarried have preference over the married.

In the present case, Varubai on her death left her surviving one son and three daughters. The question, whether any of the daughters was unmarried at the time of Varubai's death when the succession opened, was not raised in either of the Courts below, because the daughters claimed the right of heirship jointly

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(1) (1882) 9 Bom. 115.

(2) (1901) 3 Bom. L. R. 201.

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to the exclusion of the son. From the conclusion of law we have arrived at, it follows that the son and the daughters of Varubai became co-owners having equal shares in the property. They have no right to eject the appellant, who stands in the shoes of the son. But, though the exclusive title set up by them is negatived by our conclusion of law, yet relief can be given to them in this suit for ejectment by way of joint possession with the appellant: *Naranbhai v. Ranchod*⁽¹⁾. But before a decree for joint possession is passed, it is necessary to determine whether all or any of the respondents (plaintiffs) were unmarried when their mother Varubai died, because it is only the unmarried who would be entitled to share in the property with the son in preference to the married. Unless the parties are agreed on this question of fact, we must ask the lower Court to find on the following issue after taking such evidence as either party may adduce:—

(1) Was any, and if so, which of the plaintiffs, unmarried when their mother Varubai died and the succession to the property in dispute opened?

The onus will lie in the first instance on the plaintiffs.

Finding to be returned within three months.

On its return there will be a decree for joint possession in favour of those entitled.

Issue sent down.

R. R.

(1) (1901) 26 Bom. 141.

CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR v. GANESH DAMODAR SAVARKAR*.

Indian Penal Code (Act XLV of 1860), sections 107, 108, 121,

124A—Abetment—Sedition—Waging of war.

The accused published a book containing eighteen poems, of which four were the subject-matter of the charge. The general trend of the poems charged, as well as the remaining ones in the book evinced a spirit of bloodthirstiness and

* Criminal Appeal No. 290 of 1909.

murderous eagerness directed against the Government, conveyed the urgency of taking up the sword, and made an appeal of blood-thirsty incitement to the people to take up the sword, form secret societies and adopt guerilla warfare for the purpose of rooting out the British rule.

Held, that the accused committed the offence of abetting the waging of war (section 121 of the Indian Penal Code), by the publication of the poems charged.

Held, further, that the Court was entitled to look into the poems other than those forming the subject-matter of the charge, for the purpose of finding out the intention of the writer and the design of the publication.

Per CHANDAFARKAR, J.:—Under the Indian Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by section 121: that is, the abetting of waging of war is under the Code as much an offence of treason as the waging of war itself.

The word “abetment” is defined in section 107 of the Code and one of its meanings, as given there, is “instigating any person to do anything.” This meaning is not excluded by anything that occurs in section 121. The general law is laid down in sections 107—120 of the Code. According to it, “to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.” This applies to the abetment of the waging of war against the King as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded and abetment which has failed, section 121 does away with that distinction so far as the offence of waging war is concerned, and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever. And that for this simple reason that such a crime more than any other must be sharply and severely dealt with at its very first appearance and nipped in the bud with a strong hand.

Per HEATON, J.:—Under section 107 of the Indian Penal Code there may be instigation of an unknown person.

The word “abet” as used in section 121 of the Code, has the same meaning as is given to it by section 107. The “abetment” meant by section 121 is not necessarily confined to abetment of some war in progress. There may be, and usually, is instigation of rebellion before rebellion actually begins: that kind of instigation is under the Code abetting waging war against the King.

So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war.

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APPEAL from conviction and sentence recorded by B. C. Kennedy, Sessions Judge of Násik.

The accused was charged with offences punishable under sections 121 and 124A of the Indian Penal Code.

The facts were that early in 1908, he published a booklet styled "The Laghu Abhinav Bharat Mala." It contained in all eighteen poems in number, of them, the poems which formed the subject-matter of the charge, were those numbered 5, 7, 9, 17 (verses 4-7). They ran as follows :—

V. An old moral story⁽¹⁾

Oh! you stout hearted, hear an interesting story; lovingly keep in (your minds, the beautiful moral⁽²⁾ of it.

This (sort of) fun has taken place over and over again from ancient times; the black god of black (people) gives a drubbing to the foreign demons.

2. Madhu and Kaitabh⁽³⁾ were foreign demons on inimical terms with the creator; Vishnu, the black (god) of the blacks, destroyed them in no time.

3. Similarly when the foreign demon named Hiranyaksha became very powerful, the black Varaha⁽⁴⁾ sent⁽⁵⁾ him to the kingdom of (the god of) death.

4. The sable Shree Ram took up cudgels on behalf of the blacks and killed the arrogant alien ruler Ravan.

5. Oh! alien Kansa: do not truly give yourself airs through the intoxication of royal (authority); the dark Krishna the god of the blacks will destroy⁽⁶⁾ you.

6. The dark complexioned lord Shivaji (was) to the blacks a good (and) stout hearted friend; the alien Mleshhas have had (a taste of) his Maratha hospitality.

7. If any foreign Rakshas become irresistibly insolent in future, king Kali of the blacks will drive them beyond the seas (or the Indus).

VII. Sentiment of the people of Shivaji's times.

(In these verses the sentiments entertained by the people at the time of Shivaji's birth are described).

1. The Aryans invoke (God) Ganesh to destroy (their state of) dependence. Oh God! take the sword in hand and be ready for battle. (Chorus). Oh (God)! the demons of dependence have produced great misery on the earth; the people have been harassed; Oh! auspicious one of the world, fondle them with (thy) loving hands.

(1) Literally, fun.

(2) Substance.

(3) Names of demons said to have been killed by Vishnu.

(4) Boar, an incarnation of Vishnu.

(5) Literally, shewed him the darbar.

(6) Literally, make turmeric powder of you.

2. This demon is more⁽¹⁾ cruel (and) irresistibly powerful than Sindhur⁽²⁾. In a drama of fraud we say he is treacherous, a cut-throat and a wretch.

3. Petitions and prayers have often been presented and offered in humble prostrations. But he, really the meanest of all, does not yield to our supplications.

4. Only one remedy is left now (and that is) striking⁽³⁾ with the sword. This wicked being must, anyhow, be destroyed by various means⁽⁴⁾.

5. The powerless mouse, (on which you usually) ride, will be crushed entirely on the battlefield; and, therefore, I tell you to mount on a steed as swift as the wind.

6. O Munificent one! be similarly armed with new weapons. These old weapons are now not of much use in battle.

7. Never give (open) battle to the enemy, his army is vast. Guerrilla tactics should be resorted to, as they are the mainstay of a small force.

8. The whole of this plan should be carried out secretly by gathering together hardy patriots who are like a bouquet of beautiful flowers.

9. On your achieving some slight success the immortal kings of various places and also their Sardars will, indeed, come to assist you.

10. Oh Lord! May you kill the demon and give victory to the people, and grant mother earth! Oh (lord)! the beautiful and suspicious wreath of independence.

11. Hearing this invocation of the Aryas, God Ganpati was deeply touched and then having incarnated himself as Shivaji, he killed the (demon of) dependence.

IX. Who obtained independence without war?

1. Was glorious Rama, sable as a cloud, a fool to have freed his mother, the earth, from servitude? Did he then wage war to no purpose? Who obtained independence without war?

2. How many petitions did the people of Netherlands send? Those princes of mendicancy offered many a prayer to (their) enemy. Did ⁽⁵⁾ they then obtain their kingdom? Who obtained independence without war?

3. Ask the Greeks themselves how they achieved their national emancipation. (There are) no other paths leading to emancipation than war. Who obtained independence without war?

4. The Swiss did not (merely) offer weak resistance (to the enemy) through fear of the armies of wicked persons, (they) quickly proceeded to (perform) the sacrifice of a good war. Who obtained independence without war?

(1) Literally, excessively.

(2) Name of a demon.

(3) Literally, beating.

(4) Literally, efforts.

(5) Literally, did their kingdom then come into their wallet.

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5. Tyrol would not bend (the knee) to her enemies. She would not (also) choose (a policy of) beggary. She rather appealed to her own sword. Who obtained independence without war ?

6. Had the great Shivaji any eager desire to sacrifice in vain the lives of others ? (But) of how many (of his) brethren had (he) to shed the blood ? Who obtained independence without war ?

7. Similarly, heroic Italy struggled manfully on the battle-field by founding (her) secret societies in good time. Good fortune followed (1) her spontaneously. Who obtained independence without war ?

8. The Americans did the same. They fought and drove away their country's servitude. Then that servitude fled towards the East. Who obtained independence without war ?

9. Know it to be an established truth of the past that no one is able to obtain independence without war. He who desires Swaraja must wage war. Who obtained independence without war ?

The prayer of the Mavalas to God Shiv.

* * * * *

XVII. 4. At night the leaders full of love, hold secret consultations in the interest of their country and thoughtfully weigh the strength of the enemies with a view to conquer them.

5. The youths whose minds are longing for battle unfurl the flags over their steeds ; like wise * * * * .

6. Men by taking exercises in the gymnasium belonging to secret society have, indeed, under difficulties developed strong wrists.

7. And in the like manner, behold, O Lord, the naked (*i. e.*, unsheathed) swords, being as it were the beloved wives of heroes have grown highly impatient to swim in pools of blood.

The accused was tried before the Sessions Judge of Násik with the aid of assessors : the Judge agreeing with the assessors found the accused guilty of having attempted to excite disaffection towards His Majesty the King Emperor (section 124A of the Indian Penal Code) and of having abetted the waging of war against the King Emperor (section 121A of the Code). The accused was sentenced to undergo rigorous imprisonment for two years for the first offence ; and to transportation for life with forfeiture of property, for the second.

The accused appealed to the High Court.

At the hearing, the Court directed all the poems in the book to be translated.

(1) Literally, came calling after her.

Baptista (with him *B. V. Desai*), for the accused.—We submit that the conviction and sentence under section 121 of the Indian Penal Code are contrary to law. First, because, the poems charged have no reference to the Government of India or to the present time; and, second, because (1) the poems charged do not constitute abetment of waging war against the King as contemplated by section 121; and (2) that they do not even amount to abetment as defined by section 107 of the Code.

[Counsel here commented on all the poems charged and contended that all they conveyed was merely mythological allusion; and they referred to times long since past. He said that viewed as such they have no reference near or remote to the present Government of India; and did not constitute any of the offences charged. He went on.]

Assuming for argument's sake that the poems do refer to the British Government, then we say that they do not fall within the purview of section 121. In England, there are two kinds of levying war—one against the person of the King and the other against the Majesty of the King: *In re Gordon*⁽¹⁾. The former kind seems to have been contemplated by section 121; the section does not take in the second kind at all. To wage war in order to subvert the Government of India would be to wage war against the Majesty of the King; but it is no offence under section 121.

Assuming that section 121 includes the waging of war against the Majesty of the King, then even the accused has committed no offence. The lower Court has found him guilty of “abetment” of waging war under section 121. We submit abetment under section 121 is not the same as abetment under section 107. To abet under section 121 means joining or aiding an existing insurrection. This appears from the illustrations to the section.

Assuming, however, that abetment under section 121 is the same as abetment defined in section 107, the facts of this case do not constitute abetment under section 107. For first, there is no instigation in fact whatever. Secondly, there must be evidence to show that some person was actually instigated. Thirdly, the

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⁽¹⁾ (1781) 21 St. Tr. 486, 645.

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instigation must be in the present case "to wage war against the King". To that definite thing a person must be instigated. Of that, there is no evidence here. The poems are, on the face of them, puerile, and nobody should take them seriously. The poems may inflame feeling or excite hatred of foreign rule, but they fall far short of a call to arms or action and therefore do not constitute instigation.

The conviction and sentence passed under section 121 should, I submit, be set aside.

G. S. Rao, acting Government Pleader, for the Crown.—The abetment under section 121 and section 107 is the same. The effect of section 7 is that the term "abetment" is used in one uniform sense throughout the Code. The reason for making a special mention of 'abetment' in section 121 was to make it as highly punishable as the substantive offence. In the same way, section 121-A punishes conspiracy though section 107 provides for conspiracy.

The person instigated would here be the reader of the poems; and the thing instigated would be to wage war. The offence, therefore, is complete.

Baptista was heard in reply.

CHANDAVARKAR, J.—This is an appeal from the judgment of the Sessions Judge of Nasik, convicting the appellant Ganesh Damodar Savarkar, of the offences under sections 124A and 121 of the Indian Penal Code, that is, of exciting disaffection towards His Majesty the Emperor and the Government established by law in British India and of abetting the waging of war against His Majesty. The appellant has been sentenced by the learned Sessions Judge to two years' rigorous imprisonment for the offence under section 124A, and to transportation for life with forfeiture of all property to the Crown under section 121.

The offences arise out of four, from among a series of eighteen, poems, published in a book entitled *Laghu Abhinava Bharata Mala*, i.e., a Short Series for New India, and recorded as exhibit 6 as part of the evidence in the case. The four poems are those numbered in the book as 5, 7, 9 and 17, respectively. Of poem

No. 17, only verses 4 to 7 form the subject-matter of the offences proved.

When the appeal came on for hearing before us on the 13th of October, Mr. Baptista contended that none of these four poems had or were intended by their writer to have any reference either to His Majesty the King-Emperor or to the British Government in India or to the present political condition of the country. On examining the series of poems in the book, exhibit 6, containing the four poems, it appeared to us that there were other poems in it besides those four, which threw light on the intent of the writer ; and that, as the whole book had been allowed in the lower Court to go in as evidence without any objection, all the poems in the book could be referred to for the purpose of determining the intention, character, and object of the poems selected as the basis of the charges against the appellant in the lower Court. We adjourned the hearing for an official translation of the whole series of poems in the book into English and also to enable the appellant's legal advisers to argue the appeal with reference to the bearing of the whole series on the poems forming the subject-matter of the charges.

In supporting this appeal, Mr Baptista, the learned counsel for the appellant, has raised two points. First, he contends that the poems charged as treason and sedition are either mythological or historical references and do not relate either to the British Government of India or the present times. I cannot accede to this argument. It is true that the writer has chosen either mythological or historical events and personages, but that is for the purpose of illustrating and emphasising his main thesis, that the country should be rid of the present rule by means of the sword. The innuendoes cannot be mistaken or misunderstood. For instance, the 5th poem purports to refer to the destruction of "foreign demons" by Rama, Krishna, and Shivaji. But that it is not a mere description of the past but is meant to be a covert allusion to the British is apparent from the frequent use of the term "black" referring to the people of this country. Any one can see that the frequent play upon the word "black" is intended as a contrast to the word

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"white" and the implication is that the "black" are ruled by the "white" and that the latter will and must be killed by "a black leader of the black." So also as to the next poem, No. 7. Under the guise of an invocation or prayer to Ganesh, the god who, according to Hindu belief, destroys evil, the writer calls upon him to take up the sword and be ready for war, because "the demons of subjection have spread lamentation all over the world." The "demons" are characterised as "dissembling, notorious, treacherous, cut-throat." "Applications and petitions," says the writer, "were frequently made, attended with abject submissions. But this meanest of the mean would not indeed be persuaded by begging." And he goes on to say that "this meanest of the mean" must be killed "by the blows of the sword." This poem is headed "the state of mind of the people at the time of Shivaji's birth." The people are supposed to offer a prayer to the god Ganesh to take up the sword and exterminate the demon who has subjected the country to dependence. The allusion to petitions rejected is obviously to what is called by some "the policy of mendicancy." Ganesh is asked to take birth as Shivaji. The writer evidently has in mind the Ganapati *melas* of the present times and he who runs may read the animus of the lines and the lesson intended to be conveyed. The 9th poem, which is headed "Who obtained independence without war?" winds up with this remark: "He who desires *swarajya* (one's own rule) must make war." The 17th poem professes to be a "prayer of the Mavlas to the god Shiva," but one can plainly see that the sting of the verses lies in the covert allusion to the present rulers of British India. The translation of the poems into English brings out the sting clearly enough, but to those who know Marathi, who can either sing or understand the poems sung, the venom is too transparent to be mistaken for anything else than a call to the people to wage war against the British Government. It is idle for counsel to quibble about the meaning of certain words in the poems, such as *parka* and *kala* and argue that they have no reference to the present times.

No doubt the writer has used several words, each having a double meaning, but that meaning only serves to emphasise the fact that the writer's main object is to preach war against the

present Government, in the names of certain gods of the Hindus and certain warriors such as Shivaji. Those names are mere pretexts for the text which is : "Take up the sword and destroy the Government because it is foreign and oppressive." For the purpose of finding the motive and intention of the writer, it is unnecessary to import into the interpretation of the poems sentiments or ideas borrowed from the Bhagavad Gita. The poems afford their own interpretation, and no one who knows Marathi can or will understand them as preaching anything but war against the British Government. Mr Baptista has conceded that, if the poems be construed as referring to the British Government, they fall within the meaning of sedition under section 124A of the Indian Penal Code. That they are such as to excite disaffection goes without saying.

The only question is whether these poems also fall within section 121 of the Code and amount to an abetment of the waging of war against the King-Emperor and his rule in India. Mr. Baptista's contention is that the word *abet* in this section must be construed as excluding all idea of mere instigation, and that, for the purposes of the offence of abetment under this section, there must be some actual insurrection; that, in other words, it must be shown that a large multitude was collected and had weapons for mischief. Under the English law "mere words spoken, however wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King, or the levying of a war against him, and in the contemplation of the speaker, do not amount to treason." And the same has been held to apply to writings. *King v. Andrew Hardie* ⁽¹⁾. But under our Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by section 121. That is, the abetting of waging of war is under the Code as much an offence of treason as the waging of war itself. The word "abetment" is defined in section 107 of the Code and one of its meanings, as given there, is "instigating any person to do anything." This meaning is not excluded by anything that

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(1) (1820) 1 St. Tr. (N S.) 610 at p. 625.

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occurs in section 121. The general law as to abetment is laid down in sections 107 to 120 of the Code. According to it "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." This applies to the abetment of the waging of war against the King as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded, and abetment which has failed, section 121 does away with that distinction, so far as the offence of waging war is concerned and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever. And that for this simple reason that such a crime more than any other must be sharply and severely dealt with at its very first appearance and nipped in the bud with a strong hand.

But it is urged that in the present case there has been no instigation by the appellant of any person or ascertained body of persons by means of these poems to wage war. It is in evidence and is admitted before us by appellant's counsel that the book containing the poems was exposed for sale and published and that copies of it were circulated among the public, that is, among a large number of persons. Because that number cannot be definitely ascertained or counted, it cannot be said that the publication was not to "a body of persons."

Mr. Baptista's last argument is that these poems do not instigate any one to wage war but merely prepare the minds of the people for war and constitute no more than constructive treason. That is asking us to put too mild a construction on the poems—a construction which is not supported by the plain words, not to say the innuendoes of the poems. The fifth poem does not indeed contain any direct instigation to war, but the seventh poem, in the name of the god Ganesha, is substantially an appeal to people to take up the sword and fight with "the demons" who, it is said, "have spread lamentation

throughout the country" by subjecting it to their rule. And the ninth poem concludes by saying that he who wishes for *Swarajya* must wage war. And that is the dominating idea or text of the whole book. We are entitled to look into the poems other than those forming the subject-matter of the charges for the purpose of finding out the intention of the writer and the design of the publication. In poem No. 6 the writer calls upon Aryans to devise some remedy against what he calls the slavery of foreign rule and says that the kingdom of independence can be obtained only through "pools of blood." Poem No. 2 is a most direct appeal to young men "to gird up their loins," "cast off foreign yoke," "take up sticks," and "cut out the cage of slavery." Merely saying that independence cannot be gained without fighting may not amount to treason, but here it is more than that. A spirit of blood-thirstiness and murderous eagerness directed against the Government and "white" rulers runs through the poems: the urgency of taking up the sword is conveyed in unambiguous language, and an appeal of blood-thirsty incitement is made to the people to take up the sword, form secret societies, and adopt guerrilla warfare for the purpose of rooting out "the demon" of foreign rule. All this is instigation.

For these reasons the convictions and sentences under sections 121 and 124A must be confirmed and the appeal dismissed.

HEATON, J.—The appellant in this case has been tried for, convicted of, and punished for sedition and abetment of waging war against the King under sections 124A and 121 of the Indian Penal Code, in that he published certain poems. The correctness or otherwise of the conviction depends entirely on the character of the poems. Certain of them are specifically referred to in the charge. The rest have been referred to in argument and a perusal of the whole is necessary in order to ascertain the true character of those specifically referred to in the charge.

There are in all eighteen poems.

No. 1 is a prayer to God to grant independence.

No. 2 is a lament that India is enslaved and is without independence.

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No. 3 is a dialogue between Shivaji and others, in which Shivaji exhorts his hearers to plant the banner of independence.

No. 4 is loving advice to a drunkard.

No. 5 recites how in the past the gods or heroes of the blacks punished the enemies of the blacks (or aliens) and that if hereafter foreign (or inimical) demons become arrogant they will be driven beyond the sea.

No. 6 is a hymn to the goddess of independence.

No. 7 describes how, prior to the birth of Shivaji, there was a desire that subjection should be overcome by making war, and how Shivaji came and conquered. The poem is suggestive of the need of similar action now.

No. 8 is a prayer for independence amongst other things.

No. 9 is a prayer with the refrain "who ever got independence without battle" ?

No. 10 is a lament that the country has fallen into servitude and an exhortation to get independence even by fighting.

No. 11 is an exhortation to the young to fight for independence.

No. 12 holds up those who are not in favour of independence to scorn and the patriot to reverence.

No. 13 is a prayer to God to put an end to the dependence and servitude of the country and to bring independence.

No. 14 is described as a morning song to dependence, and ends thus :—

"O dependence ! let the star of independence, the bestower of knowledge and joy, the wife of the Lord of the Universe, who is as the moon, rise again in the land of the Aryas."

No. 15 is a dialogue implying that the tyrant will be overcome and the land be free.

No. 16 inculcates that the patriot has no fear of prison and contains a good deal favourable to independence.

No. 17 is a prayer to Shiva to come to lead the people to battle.

No. 18 is described as the "Utterances of Nana Phadnavis" and is an incitement to war.

The poems specially referred to in the charge are Nos. 5, 7, 9 and parts of 17.

Briefly summarised, the teaching of this book is that India must have independence: that, otherwise, she will be unworthy of herself: that independence cannot be obtained without armed rebellion and that, therefore, the Indians ought to take arms and rebel. This is quite plain though the teaching is thinly veiled by allusions to mythology and history. It is sedition of a gross kind and very little attempt was made to show that the conviction under section 124A of the Indian Penal Code was not correct.

But it was earnestly argued that the conviction under section 121 was wrong.

It was argued that there was not any instigation and therefore there was not any abetment. With this I will deal later. Then it was argued that there was not any instigation of any known or definite person and that short of this there could not be abetment. The foundation of this argument is to me unintelligible. So far as I am able to understand the meaning of the word 'instigate' as used in section 107 of the Indian Penal Code, there may be instigation of an unknown person. Then it was argued that the instigation, if any, falls under section 117 of the Code which provides a penalty for abetting the commission of an offence by the public or by more than ten persons. Three thousand copies of the book were printed and admittedly it was intended to sell as many as possible. Therefore the instigation was undoubtedly intended to be of the public or of more than ten persons. Consequently the offence committed is punishable under section 117. But it was further argued that it was therefore not punishable under section 121. That argument I am unable to accept. A prosecution under section 121 requires a complaint by the Government (section 196, Criminal Procedure Code). That complaint has been instituted. Having been instituted the accused had to be tried and it had to be determined whether he has committed an offence under section 121. If he has, then he must be punished under that section, whether the offence also falls under some other section or not.

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Therefore the question to be determined is whether the offence under section 121 has or has not been committed. Briefly stated, the most cogent argument for the defence is this :—So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war. That is, it seems to me, a correct statement. Therefore it has to be determined whether the poems recited in the charge do clearly instigate to action. It is contended for the defence that they do not. In my opinion they do. In unmistakable language they tell the readers of the book to form secret societies, to take arms and to revolt against the Government. That is clearly to my mind an instigation to action. Therefore I think the conviction is correct and should be confirmed.

I attach no importance to the argument that the word 'abet' in section 121 means something less than that word as used in section 107 of the Indian Penal Code. Section 7 of the Code refutes that argument. Nor am I impressed by the argument that the abetment meant by section 121 means abetment of some war in progress. There may be and usually is instigation of rebellion before rebellion actually begins. Under the law of this country, instigation of that kind is abetting waging war against the King.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

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BASANGOWDA HANMANTGOWDA PATIL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. CHURCHIGIRIGOWDA YOGANGOWDA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Court—Inherent powers—Compromise—Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside.

In the course of a suit, a compromise was presented which was signed by the defendants' pleader who was not specially authorised in that behalf. The Court

* Civil Extraordinary Application No. 215 of 1909.

passed a decree in terms of the compromise. The defendant then applied to the Court to set aside the decree on the ground that he did not engage the pleader and that he had not authorised the pleader to compromise the suit. The Court set aside the decree and set down the suit for hearing.

Held, that it is the inherent power of every Court to correct its own proceedings where it has been misled.

Held, also, that under the circumstances, the compromise was not binding upon the defendant and the decree passed upon it was void as to him.

CIVIL extraordinary application from the order passed by G. N. Kelkar, First Class Subordinate Judge at Dhárwár.

The plaintiffs filed a suit against defendants Nos. 1 and 2 in the Court of the First Class Subordinate Judge at Dhárwár. In that suit, the defendant No. 1 engaged a pleader for him and for his brother (defendant No. 2). The pleader, it appeared, never had any interview with defendant No. 2. Defendant No. 1 compromised the case with the plaintiffs; and at his instance the paper of compromise was signed by the pleader. The Court passed a decree in terms of the compromise.

Defendant No. 2 thereupon applied to the Court stating that he had not engaged the pleader and that he had not authorised him to enter into the compromise.

The Court set aside the decree and set down the suit for hearing.

The plaintiffs applied to the High Court under its extraordinary jurisdiction.

S. R. Bakhale, for the applicants.

K. H. Kelkar, for the opponent No. 2.

CHANDAVARKAR, J.:—It is contended that the lower Court has erred in law in upsetting the decree, which was passed in terms of what purported to be a compromise between the parties. The compromise ended in a decree, because it was stated to the Court that the present opponent (defendant) Bhimangauda, who was represented by his pleader, had authorized the latter to enter into the compromise. Bhimangauda, after the decree had been passed, applied to the Court to set aside the compromise on the ground that the pleader had not been instructed to

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appear for him in the suit and that he had given him no instructions in the case, authorizing him to enter into any compromise. If that was so, the compromise was not binding upon Bhimangauda, and the decree passed upon it was void as to him. It was *ultra vires*. The Court had been asked to put its seal upon and sign a document, which had no legal foundation to rest upon, and if that decree goes out, then the whole suit is re-opened. But it is said that the procedure adopted by Bhimangauda is not in accordance with law ; that there is no section in the Code of Civil Procedure which entitles a party in the situation in which the defendant is, to ask the Court to re-open the suit and set aside the decree in a summary manner. Now, where limited authority was given to Counsel to enter into a compromise and Counsel entered into a compromise beyond that authority, it has been held by the House of Lords that Counsel, having exceeded his authority, the party was entitled to have the agreement to refer set aside and the cause restored to the list for trial: *Neale v. Gordon Lennox*⁽¹⁾. What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the defendant had never consented, and that upon the representation that he had consented to it. Therefore, once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled. We must, therefore, discharge the rule with costs.

Rule discharged.

R. R.

⁽¹⁾ [1902] A. C. 465.

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice
Chandavarkar.*

HAJI UMAR ABDUL RAHIMAN (ORIGINAL PLAINTIFF), APPLICANT,
v. GUSTADJI MUNCHERJI COOPER (ORIGINAL DEFENDANT),
OPPONENT.*

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*Civil Procedure Code (Act V of 1908), section 31—Bombay Civil Courts Act
(XIV of 1869), Part V—Suit cognizable and heard by the First Class
Subordinate Judge—Application to the Court of the District Judge for
transfer—Transfer of the application to the Assistant Judge—Order of the
Assistant Judge for transfer of the suit to the District Court—Jurisdiction.*

The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial.

The plaintiff having objected that the order of the Assistant Judge was without jurisdiction,

Held, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction.

Section 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge, he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a Court of unlimited pecuniary jurisdiction.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against an order

* Application No. 187 of 1909 under extraordinary jurisdiction.

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passed by K. Barlee, Assistant Judge of Poona in the matter of an application for the transfer of a suit from the Court of the First Class Subordinate Judge.

The plaintiff sued the defendant in the Court of the First Class Subordinate Judge of Poona for the recovery of Rs. 18,797-13-0 due on a promissory note. The suit was filed on the 14th January 1909. It was heard by the Subordinate Judge on several days and was allowed to stand over till the 19th July 1909. The defendant, however, on the 17th July presented a miscellaneous application, No. 197 of 1909, to the District Judge of Poona for the transfer of the suit to another Court on the ground that the First Class Subordinate Judge was biased against the defendant and that he illegally granted plaintiff's application for the examination of two witnesses after the evidence for the defence was taken.

The District Judge transferred the said application to the Assistant Judge for disposal.

The Assistant Judge heard the application and found that the Subordinate Judge was absolutely free from any bias against the defendant. He, however, ordered the suit to be transferred to the District Judge of Poona on the following grounds :—(1) That the defendant had a genuine belief that he would not obtain justice from the First Class Subordinate Judge, and (2) that the order of the Subordinate Judge granting the plaintiff's application for the examination of two witnesses after evidence for the defence was taken, was illegal and if it were carried into effect it would prejudice the defendant.

Being dissatisfied with the said order, the plaintiff preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging that the District Judge had no jurisdiction to transfer the miscellaneous application to the Assistant Judge, that the Assistant Judge had no jurisdiction to dispose of the said application and that there was no ground whatsoever to transfer the suit as ordered by the Assistant Judge. A *rule nisi* was issued requiring the defendant to show cause why the order of the Assistant Judge should not be set aside.

Strangman (Advocate-General) with *G. S. Rao* and *A. G. Sathaye* appeared for the applicant (plaintiff) in support of the rule :— The Assistant Judge found that the Subordinate Judge was not at all biased against the defendant. Therefore he should have dismissed the defendant's application for the transfer of the suit. No ground has been made out for the transfer. Even admitting that the order of the Subordinate Judge granting our application for examining witnesses after the defendant had commenced his case was illegal, still we submit the order would afford a ground for appeal and not for transfer. The application for transfer was in the nature of appeal.

Next we contend that the Assistant Judge had no jurisdiction to entertain the application. Under section 24, sub-section 3 of the Civil Procedure Code, only the High Court or the District Judge can exercise jurisdiction and not the Assistant Judge who is subordinate to the District Court. If the Assistant Judge had jurisdiction, he could have transferred the suit to his own file. But he could not do so because under the Bombay Civil Courts Act, section 16, the limit of his pecuniary jurisdiction is Rs. 10,000 while the claim in the present suit amounts to Rs. 18,797 and odd. The jurisdiction exercisable is a personal one, that is, peculiar to the High Court or the District Court. The section expressly differentiates the Assistant Judge from the District Judge.

Ruikes with *M. B. Chaubal* (Government Pleader) and *J. R. Gharpure* appeared for the opponent (defendant) to show cause :— The Assistant Judge is an assistant of the District Judge in the District Court. Therefore he forms part of the District Court. Sub-section 3 of section 24 of the Civil Procedure Code recognizes the fact that the Assistant Judge is part of the District Court : see also Bengal Act XII of 1887, section 8 (2). Section 16 of the Bombay Civil Courts Act must be read in that light.

The present application is not in the nature of appeal. The prayer for transfer is not co-extensive with the right of appeal, as for example, Small Cause Suits are transferred to the High Court : *Abdul Karim v. The Municipal Officer, Aden*⁽¹⁾.

(1) (1903) 27 Bom 575.

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Under the Regulations and the Civil Procedure Code the Assistant Judge can transfer to the District Court only and not to his own file.

SCOTT, C. J. :—The applicant obtained this rule calling on the opponent to show cause why an order of the Assistant Judge of Poona should not be set aside as being without jurisdiction.

The material facts are that a suit filed by the applicant in the Court of the First Class Subordinate Judge of Poona against the opponent claiming Rs. 18,797-13-0 had been heard by that Judge for some days when the opponent filed an application in the Court of the District Judge for transfer of the suit to another Court.

The District Judge transferred the application to the Assistant Judge for disposal.

The Assistant Judge heard the application and ordered that the suit be transferred to the District Court, Poona, for trial.

It is objected that this order was without jurisdiction as the application was under section 24 of the Code (Act V of 1908) which gives power to the High Court or District Court (b) to withdraw any suit pending in any Court subordinate to it and (i) try or dispose of the same or (ii) transfer the same for trial or disposal to any Court Subordinate to it, whereas the Assistant Judge has ordered the withdrawal of the suit from a Subordinate Court and transferred it for trial to a Court *superior* to him. The answer of the opponent is that the order is legal as the Assistant Judge is one of the Judges of the District Court and his order is in effect the order of the District Court. In order to judge of the position of the Assistant Judge we must turn to the Bombay Civil Courts' Act XIV of 1869, Part V, which is concerned with the creation and functions of Assistant Judges. It is to be observed that the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in the case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000 an appeal in appealable cases lies to the District Judge. The Assistant Judge is therefore not a Judge of co-ordinate jurisdiction with the District Judge. He is therefore not a Judge of the District Court and

the order complained of is not made by the District Court which alone had jurisdiction.

The same conclusion follows from a consideration of the words of section 24 of the Code. The District Court may withdraw any suit *and* try and dispose of it. Here the suit withdrawn was for a sum exceeding the jurisdiction of the Assistant Judge and he therefore could not try and dispose of it. He therefore is not a judge of a District Court as contemplated by the section, which must be a Court of unlimited pecuniary jurisdiction.

Again section 24 provides that for the purposes of the section the Courts of Assistant Judges shall be deemed to be subordinate to District Courts but the opponent's argument is based on the contention that for the purposes of the section the Court of the Assistant Judge is part of the District Court.

The rule must be made absolute setting aside the order with costs.

CHANDAVARKAR, J. :—I do not think that an Assistant Judge's Court can be held to be a District Court or even part and parcel of it for the purposes of *all* suits and miscellaneous applications. An Assistant Judge's decree passed in suits is generally appealable to the District Court; probate applications and cases arising under the Land Acquisition Act heard and determined by him have been held by this Court to be similarly appealable. Therefore, whether the Assistant Judge's Court is a District Court or not must depend upon the law under which that Court exercises jurisdiction in any given case. In the matter of the present application, the jurisdiction exercised was under section 24 of the Code of Civil Procedure. Now, it is true that in the present case under the Bombay Civil Courts' Act, section 19, the District Court "referred" the application for transfer made to it to the Assistant Judge's Court for disposal; but a power to decide a case referred to it by a higher Court does not necessarily make the Court, to which it is referred, the equal of the former, unless the provision of the law under which the case has to be decided confers jurisdiction on the lower Court. Section 19 of the Bombay Civil Courts' Act is a merely enabling section, giving power of reference to the District Court in respect of suits and

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miscellaneous applications, but section 24 prescribes the conditions of the jurisdiction of the District Court. These are restrictive conditions and those of them which apply here require that the Court exercising jurisdiction must be one which is competent, according to law, to try or dispose of the suit withdrawn from a lower Court. Here the Assistant Judge's Court, it is conceded, was not so competent.

The rule must be made absolute by setting aside the order of the Assistant Judge and directing the District Court to retake the application on its file and dispose of it according to law. Rule absolute with costs.

Rule made absolute.

G. B. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt, Chief Justice, and Mr. Justice Batchelor.

HARGOVAN RAMJI, APPELLANT AND PLAINTIFF, v. MULJI
HARJIVAN, RESPONDENT AND DEFENDANT *

*Res judicata—Capacity of parties—Matter substantially in issue—
Civil Procedure Code (Act XIV of 1882), section 13.*

The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court, but the Court of Appeal held that the property had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and he content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager.

Held, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*.

If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882) section 13 does not apply.

* Original Suit No. 764 of 1907.

Appeal No. 50 of 1908.

THIS was a suit filed by the plaintiff for possession of certain premises, and for ejectment of the defendant therefrom. The facts previous to the filing of the present suit were as follows:—

In the year 1879 Champa, the paternal aunt of the plaintiff's mother, and the admitted owner of the premises in question, died leaving a will dated the 22nd September 1865. In a clause of this will she announced her intention of making a dedication to charity. A few years before her death, namely in 1873, she had affixed an inscription upon a shrine forming part of the premises, purporting to dedicate it to religious uses, and appointing the plaintiff and his brother to be managers thereof after her own death. After Champa's death, various mortgages were made on the property by the plaintiff, and finally these charges were all acquired by one Merwanji Cama. About the year 1900 the present defendant managed to obtain possession, and in 1902 the plaintiff as owner and Merwanji Cama as mortgagee, filed suit No. 254 against him to recover possession. The first Court decided in the plaintiff's favour. On appeal by the defendant, the Appeal Court went into the question of the dedication to charity, and held that Champa had intended to dedicate this property and had given valid effect to that intention. Under these circumstances they refused to uphold the plaintiff's title as owner, but suggested that he should modify his claim and ask for a decree as manager. On the plaintiff declining to do this, the decree was reversed and the suit dismissed with costs.

After a lapse of five years the plaintiff filed the present suit, claiming possession as manager. The defendant in his written statement set up (*inter alia*) the plea of *res judicata*, and Mr. Justice Russell, before whom the case was heard, decided this preliminary point in his favour and dismissed the suit.

The plaintiff appealed.

Chitre (with *Desaz*) for the appellant:—Section 13 of the old Code of Civil Procedure, under which this point was decided, must be considered in conjunction with sections 42 and 43 which lay down that a plaintiff must include the whole of the claim which he is entitled to make in respect of the cause of action. But he need not join distinct causes of action, and in the present

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case the two claims as owner and as manager are not such as ought to be joined: see *Ramaswami Ayyar v. Vythinatha Ayyar*⁽¹⁾ and *Babajirao v. Larmandas*⁽²⁾.

Explanation II to section 13 only applies where the relief claimed in the former suit was identical with that claimed in the subsequent suit: see *Sarkum Abu Torab Abdul Waheb v. Rahaman Buks*⁽³⁾.

Inverarity (with *Raikes*) for the respondent:—The claim made by the plaintiff in this suit ought to have been put forward in the former suit: see *Guddappa v. Tirkappa*⁽⁴⁾.

SCOTT, C. J.:—The question in this case is whether the plaintiff is entitled to maintain this suit, having regard to the proceedings in a previous suit instituted by him in the year 1902. In that year he filed suit No. 254 against certain persons whom he alleged to be in possession of a room used as a temple in a house which was his property. In the plaint he did not set out his title to the property and, as appeared in the course of the trial, he had avoided stating circumstances which raised a question as to whether the whole property was not the subject of a religious trust. He succeeded in the first Court in getting a decree for ejectment against the defendants with respect to the room used as a temple. In the Court of Appeal it was held that the house was impressed with a religious trust and his only possible claim must be based upon his right as manager. He was then offered an opportunity of altering his case so as to base it upon his right as manager under the will of the person who established the trust. That offer was however refused and the suit was dismissed. He has now filed this suit alleging what he ought to have alleged in the first suit, the will of Champa who established the trust, and relying upon a passage in that will to show that he is entitled as manager to eject the defendant as manager from the room used as a temple and to get an account from the defendant of the profits and emoluments which he has received as manager:

(1) (1908) 28 Mad. 760.

(2) (1903) 28 Bom. 215.

(3) (1896) 24 Cal. 892.

(4) (1900) 25 Bom. 189.

Now whether he can maintain this suit in the face of the provisions of section 13 of the Civil Procedure Code of 1882 depends upon the question whether he is now suing in a capacity in which he is a stranger to the capacity in which he sued in the former suit. If he is not so suing, then the claim which he is now putting forward is a claim which might and ought to have been put forward in the previous suit. If he is so suing, then it is a claim which has no proper connection with the previous suit. That is the conclusion to be drawn from the two most recent Bombay cases which have been relied upon in argument, namely, *Guddappa v. Tirkappa*⁽¹⁾ and *Babajirao v. Laxmandas*⁽²⁾. It has been argued by Mr. Chitre, in his excellent argument, that in this case the plaintiff really sues on behalf of the temple and therefore, on the authority of the case last referred to, he must be taken as suing as a stranger to the interest in which he sued in the first suit. It is, however, pointed out by Sir Lawrence Jenkins in that case that in connection with the property of a Math there are two distinct classes of suits: those in which the manager seeks to enforce his private and personal rights, and those in which he seeks to vindicate the rights of the Math.

Now this is clearly a case in which the manager seeks to assert his right to be a manager against another person who claims the right to manage. He is not seeking to vindicate the rights of the Math against a stranger to the temple who is improperly using the property of the endowment. He is therefore asserting a purely personal right in his own personal interest and it is a right which, in my opinion, might and ought to have been put forward in the previous suit. As remarked by Mr. Justice West in *Girdhar Manordas v. Dayabhai Kalabhai*⁽³⁾ the cases show that all the grounds relied on by the plaintiff and so connected together as to be properly the subject of a single investigation ought to be brought forward together. Both in this case and in the previous case, the investigation would be concerned with the terms of Champa's will and the inscription on the

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(1) (1900) 25 Bom. 189.

(2) (1903) 28 Bom. 215.

(3) (1882) 8 Bom. 174 at p. 180.

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property which she dedicated to religious purposes. The whole matter might have been decided in one single investigation and therefore we are of opinion that Mr. Justice Russell was right in holding that this suit is not maintainable.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Captain and Vaidya*.

Attorneys for the respondent: Messrs. *Bhaishankar, Kanga & Girdharlal*.

K. McI. K.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

VASSONJI TRICUMJI AND CO., PLAINTIFFS, v. ESMAILBHAI

SHIVJI AND OTHERS, DEFENDANTS.

*IN RE MAHOMEDBHAI ALLARAKHIA NANJI.**

Practice—Civil Procedure Code (Act V of 1908) O. 1, r. 8—Suit filed by plaintiff representing body of creditors—Application to be made party—Administration suit.

Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party, he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent him.

In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counter-balance the delay caused by the addition of a party and the consequent increase in the costs of other parties.

THIS matter came before Mr. Justice Davar in Chambers, on a summons taken out by the applicant, Mahomedbhai Allarakhia Nanji, to show cause why he should not be made a party. The facts appear sufficiently from the judgment.

Padshah for the plaintiffs, *Jinnah* for the 1st and 2nd defendants, *Jardine* for the 3rd and 4th defendants appeared to show cause.

*Suit No. 427 of 1909.

Bahadurji appeared for the applicant in support of the summons.

DAVAR, J. :—This suit has been filed by Vassonji Tricumji and Co., a firm, on behalf of themselves and other creditors of the estate of the deceased Ebrahimbhai Hassambhai against the executors, the widow and the daughter of the deceased, for the administration of his estate. The applicant, one of the creditors of the deceased, desires to be added as a party. There is no doubt that under O. 1, rule 8, sub-rule 2, he is entitled to apply and the Court has a discretion, if it thinks fit, to add him as a party. The principles on which one of a body on whose behalf a suit has already been filed can claim with some show of justice to be added as a party are well defined. He must show that his interests will be seriously affected to his prejudice if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands or that action is being taken by the parties, who purport to represent him, in some way which is prejudicial to his interests. In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason indeed that the person who has filed the suit on their behalf is not conducting it in the proper way. In an administration suit all that has to be done is for the Court to supervise the realisation of the estate, to direct that accounts be taken, and to direct how the assets are to be distributed amongst the creditors and parties interested in the residue. So an administration suit differs in its constitution very materially from those suits reference to which has been made by Mr. Bahadurji. No doubt the applicant has stated that he is coming in at his own risk and that he is willing to bear all the costs, but that does not cover the whole ground. In the first place there must be considerable delay caused by another party coming into the suit, and there will be many items of costs which have to be incurred by the other parties, if the applicant is added as a party, which they will never be able to recover. But apart from that, after reading the affidavits and specially the affidavit on which the summons was obtained, I can find no ground whatever for any suggestion that the estate of the deceased is not being properly administered by the Court or that

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the interests of the applicant are in any way being prejudiced. At his instance an officer of the Court was appointed one of the joint receivers and he relies on the fact that when the application was made for the appointment of receivers it was suggested that one of the executors should be appointed receiver together with the plaintiff. There was nothing wrong in that. It was only desired to save costs. Plaintiffs are a well known firm and as a large amount is due to them it is to their interest to realize the estate in the most advantageous way. The executors are also respectable people and there is no suggestion that they will in any way neglect the interests of the estate or of the creditors.

The result of the application being granted by me would be that the final decision of the suit would be delayed, the applicant would be able to intervene in every proceeding, the costs would be largely increased, and eventually the interests of the general body of the creditors and residuaries would be very much prejudiced. I do not want to prejudice the applicant. He may make an application in future if he can show good grounds that his interests are being injured in any way. On the present application I can see no reason to say that the estate of the deceased is not being properly administered. When the administration decree is passed, there will be the usual direction for accounts, creditors will be asked to file their claims in the Commissioner's office, and they can take part in the proceedings there. As regards the realization of the assets, I am sure that is in perfectly safe hands. If the applicant can make out a case in the future, he is at liberty to apply again.

Summons will be dismissed with costs.

Summons dismissed.

Attorneys for the applicant :—Messrs. *Captain and Vaidya*.

Attorneys for the plaintiffs and the 1st and 2nd defendants :—
Messrs. *Matubhai, Jamietram and Madan*.

Attorneys for the 3rd and 4th defendants :—Messrs. *Payne and Co.*

K. Mcl. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

W. & A. GRAHAM AND CO. (PLAINTIFFS) v. CHUNILAL
HARILAL AND CO. (DEFENDANTS) *

1909.
July 24.

Practice—Third party procedure—Directions, refusal to give—Discretion.

The general principle on which a Court will issue third party directions is :—

(1) That there must be a clear case of contribution or indemnity from the third party,

(2) that all the disputes arising out of a transaction as between the plaintiff and the defendant and between the defendant and a third party can be tried and settled in one suit, and

(3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party.

Under the rules now in force the third party cannot be cited so as to be bound by the trial of one particular question which is identical as between the plaintiff and the defendant and as between the defendant and the third party.

Baxter v. France (No. 2) (1) followed.

ON 30th January 1908 the plaintiffs entered into a contract with the defendants under the terms of which the latter agreed to purchase 50,000 tons of coal, and to take delivery thereof in 10 monthly shipments of 5,000 tons each. This original contract was subsequently slightly varied, but the variation was immaterial.

The first shipment (of 5,080 tons) arrived in Bombay on 16th January 1909, and a delivery order was duly tendered by the plaintiffs to the defendants. The latter handed the delivery order over to Messrs. Karaka and Co., with whom they were under a contract, and this firm took delivery of 400 tons. The balance of the cargo was re-sold by the plaintiffs at the defendants' risk, and was in fact ultimately bought by the defendants. The plaintiffs then sued the defendants for the price of the 400 tons of which delivery had been taken, and for damages for the loss incurred by the refusal to take delivery of the balance.

* Suit No. 399 of 1909.

(1) [1895] 1 Q. B. 591.

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The defendants thereupon obtained an order for the issue of a third party notice to Messrs. Karaka and Co., and, after duly serving the same, took out a summons for third party directions.

Cohen for the plaintiffs submitted to the order of the Court,

Jardine for the third parties showed cause :—

This is not a case for third party directions. We are not aware of the terms of the contract of 30th January 1908 between the plaintiffs and the defendants, nor of their arrangements with regard to bunkering. No question of contribution or indemnity arises. Our contract with the defendants was wholly distinct, originating in and continuing generally from an arrangement made in November 1903 with regard to the bunkering of S. S. Singapore. We have disputes with the defendants, but they have nothing to do with the plaintiffs, and cannot be disposed of in this suit.

The defendants can give evidence of the quality of the coal better than we can, as they bought all but 400 tons.

Counsel cited the following cases : *Speller v. Bristol Steam Navigation Co.* ⁽¹⁾, and *Baxter v. France* (No. 2) ⁽²⁾.

Robertson for the defendants in support of the summons :—

Messrs. Karaka and Co. had knowledge of the contract of 30th January 1908, and by their subsequent agreement with us—which was not in the same terms as the original agreement with regard to S. S. Singapore, as they allege,—clearly became liable to indemnify us. If this suit does not dispose of all questions between the third parties and us, it will at least dispose of all that arise out of this transaction. Specially important is the question of the quality of the coal, and the evidence of the third parties is necessary on this point. Finally, the plaintiffs themselves have no objection to the third parties being brought in.

MACLEOD, J.—The plaintiffs have filed this suit against the defendants to recover damages suffered by them in consequence of the defendants not taking proper delivery of a cargo of coals as they were bound to do under a contract made between the plaintiffs and defendants on the 30th January 1908.

⁽¹⁾ [1891] 13 Q. B. D. 96.

⁽²⁾ [1895] 1 Q. B. 591.

The plaintiffs say that by that agreement the defendants agreed to purchase from the plaintiffs 50,000 tons of coals, shipment January to May and August to December 1909, 5,000 tons monthly. I am told this agreement has been altered so as to extend the time to delivery of 25,000 tons in 1909 and 25,000 tons in 1910. But that is not material for the purpose of the summons.

On the 16th January 1909, the plaintiffs gave notice to the defendants that the S. S. Blake had arrived in harbour with a cargo of 5,080 tons of coal; and tendered a delivery order in pursuance of the above mentioned agreement.

Delivery was taken of only 400 tons by the defendants or their assigns and the balance of the cargo was sold at the defendants' risk. Hence the suit.

On the 25th day of May, the defendants obtained an order for the issue of a third party notice to Messrs. J. F. and B. F. Karaka, partners in the firm of Messrs. J. F. Karaka & Co.

The third party notice was issued on the 26th May. Messrs. Karaka filed their appearance on 31st May.

On the 7th June the defendants took out a summons for third party directions. At the argument of the summons before me the plaintiffs adopted a purely neutral attitude; they did not allege that they would be in any way prejudiced or embarrassed by the introduction of the third parties into the suit.

Messrs. Karaka and Co. strongly objected to any directions being given on the summons.

Very lengthy affidavits have been filed but the main dispute between the defendants and the third parties appears to be that while the defendants set up a contract between them and the third parties whereby the third parties agreed to buy from the defendants the coals of which the defendants were under contract with the plaintiffs to take delivery in 1909, the third party deny that any such contract had been made between them and the defendants and assert that the contract which did exist between them and the defendants was of quite a different nature. The general principle on which a Court will issue third party directions seems to be (1) that there must be a clear case of contribution or indemnity from the third party, (2) that all the disputes

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arising out of a transaction as between the plaintiffs and the defendants and between the defendants and a third party can be tried and settled in one action, and (3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party. In this case if directions are given there must be a preliminary issue tried as regards the terms of the contract or contracts which existed between the defendants and the third parties. Until that has been decided it is impossible to say whether the contract between the plaintiffs and the defendants has been imported into a contract between the defendants and the third parties. This alone would be sufficient reason for the Court declining to give directions. But even if there was a clear case of indemnity, I am satisfied that all the disputes between the defendants and the third party could not be jointly determined in this action: *Baxter v. France* (No. 2) ⁽¹⁾. It has been urged by the defendants that there is one question which is common as between the plaintiffs and the defendants and as between the defendants and Messrs. Karaka and Co., namely, the quality of the coal which arrived in the S. S. Blake and that if this were so, it was most undesirable that this same question should have to be decided twice over in different suits. It was further urged that Messrs. Karaka and Co. knew all about the quality of the coal ex S. S. Blake as they had taken delivery of some of it and the defendants had only passed on to them the delivery order from the plaintiffs. The answer to this is that as the defendants themselves bought all the coal ex S. S. Blake except the 400 tons taken delivery of by Messrs. Karaka and Co., they are in a better position to lead evidence as to its quality than Messrs. Karaka and Co. In England before 1883 if there was one question in the action, identical as between the plaintiff and the defendant and as between the defendant and the third party, the third party could have been cited so that he could be bound by the trial of that particular question, but that can no longer be done under the rules now in force, however desirable it might be, and the rules of the High Court are practically the same as the English rules.

[1895] 1 Q. B. 591.

In my opinion, this is clearly a case in which the Court should exercise its discretion in refusing to give third party directions. The summons is discharged and the third parties must be dismissed from the action. The defendants must pay the costs of the third parties and the plaintiffs.

Attorneys for plaintiffs : Messrs. *Craigie, Lynch & Owen*.

Attorneys for defendants : Messrs. *Little & Co.*

Attorneys for third parties : Messrs. *Thakurdas & Co.*

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ANNA RANU, PLAINTIFF, *v.* THE GREAT INDIAN PENINSULA RAILWAY COMPANY, DEFENDANTS.†

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Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations.

The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage.

The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened.

* Original Suit No. 706 of 1908.

† Original Suit No. 751 of 1908.

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THESE two suits arose out of the same incident. The plaintiffs were passengers in an up local train of the defendant Company, proceeding from Mazagaon to Masjid. At a point just before Masjid, a down mail train passed, with the door of one of its compartments open and swinging. The door caught the arms of the plaintiffs which were projecting slightly outside the carriage windows and inflicted severe injuries. As a result these two suits were filed against the Company for damages, and, as they involved the same points of law and of fact, were consolidated and heard together.

The plaintiff charged the defendant Company with negligence in allowing the door to swing open and further in having infringed the statutory regulations with regard to the dimensions of carriages and of the open way between the tracks.

The defendant Company denied negligence, and alleged that the accident was due solely to the negligence of the plaintiffs in putting their arms outside the windows in spite of notices to the contrary, and relied alternatively on the plea of contributory negligence.

It was agreed that the question of liability should first be decided, and that, if necessary, the question of damages should be considered afterwards.

Baptista (with *Joshi*) for the plaintiff in the first suit, and (with *Kajiji*) for the plaintiff in the second suit :—

The open door is evidence of negligence : *Gee v. Metropolitan Railway Company*⁽¹⁾, *Bromley v. The G. I. P. Railway Company*⁽²⁾.

The guard neglected his duty. See the general rules published by Government under section 47 of the Indian Railways Act, and also the Traffic Instructions Book of the G. I. P. Railway.

The Company has in addition infringed the standard dimensions. The width of the carriages is too great, while the space between the tracks is too small.

In the case of a breach of a statutory duty, the defendant is liable without further proof of negligence : *David v. Britannic Merthyr Coal Company*⁽³⁾.

(1) (1873) L. R. 8 Q. B. 161.

(2) (1899) 24 Bom 1.

(3) (1909) 2 K. B. 146.

The position of the windows is such that a person in the plaintiff's seat naturally puts his arm out.

The notices forbidding leaning out of the windows were in English, a language which very few 3rd class passengers can read. The defendant Company knew the notices were disregarded. Since the accident, an additional bar had been put on the windows.

Robertson (Strangman, Advocate-General, with him) for the defendant Company:—

The plaintiffs took the risk themselves. It would be a serious responsibility for the Company to have to look after passengers and prevent them leaning out of windows. All the cases show that a Company does not insure its passengers, but is bound only to take reasonable care for their safety, and that only when they remain inside the carriage: *Simon v. London General Omnibus Co.*⁽¹⁾, *Hase v. London General Omnibus Co.*⁽²⁾, *Pirie v. Caledonian Railway*⁽³⁾. See also Beven on Negligence, p. 988.

The leading case on the general responsibility of railway companies is *Readhead v. Midland Railway Company*⁽⁴⁾. See also *The East Indian Railway Company v. Kalidas Mukerji*⁽⁵⁾, and *Hanson v. Lancashire and Yorkshire Railway Company*⁽⁶⁾.

If the plaintiffs had remained wholly inside the carriage, the accident could not have happened. This is therefore most apparent contributory negligence.

As regards standard measurements, we had permission to increase the width of carriages. There is no connection between the width of the space between the tracks and the width of carriages.

The placing of an additional bar on the windows after the accident is no evidence of negligence. *Hart v. Lancashire and Yorkshire Railway Company*⁽⁷⁾.

Evidence shows that the guard did actually lock the door, so that the presumption of negligence is rebutted.

(1) (1907) 23 T. L. R. 463.

(2) (1907) 23 T. L. R. 616.

(3) [1907] 17 *Revue*, 1165.

(4) (1869) L. R. 4 Q. B. 379.

(5) (1901) 23 Cal. 401.

(6) (1872) 20 W. R. 297.

(7) (1869) 21 L. T. N. S. 261.

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There is no case similar to this in England, but in America the case of *Todd v. Old Colony, etc., Railroad Co.*⁽¹⁾ in the Massachusetts Court is wholly in my favour.

Baptista in reply:—

True the Railway Company does not insure, but it must exercise great care. It is liable for the smallest negligence, though not for unforeseen accidents. For the degree of care to be taken, see *Macnamara on Carriers*, p. 577, and *Beven on Negligence*, p. 33.

This case is of course distinguishable from *McCawley v. Furness Railway Company*⁽²⁾, see also *Thatcher v. Great Western Railway Company*⁽³⁾.

With reference to the standard dimensions, the Company ought to have widened the centre way of the track before building wider carriages. The circulars relied on as sanctioning the increased width of carriages do not really do so, as the centre way was not widened in proportion. The Company's construction of the circulars leads to absurdity.

BEAMAN, J.—These are two consolidated suits by two third-class passengers, on the defendant Company's train, for damages. The plaintiffs complain of injuries received and attribute them to the defendants' negligence. The defendants deny negligence in fact and further plead that, if there was negligence on their part, there was contributory negligence on the plaintiffs' part disentitling them to recover.

The facts, which are virtually undisputed, are, that the plaintiffs were travelling by the 1-30 local up train from Matunga to Masjid on the 22nd March 1908. A short way before Masjid station, between Mazagaon and Masjid, the down Nagpur mail passed at high speed. A door of one of the compartments on that train was open and swinging. It caught the projecting limbs of the plaintiffs inflicting very serious injuries. The first question I am to decide is the question of liability. As to the second plaintiff, the defendant contends that he had opened the door and was standing with his arm on the outside sill. About the position of the first plaintiff, there is virtually no dispute.

⁽¹⁾ 59 Mass. 207.

⁽²⁾ (1872) L. R. 8 Q. B. 57.

⁽³⁾ (1893) 10 T. L. R. 13.

He was sitting with his back to the engine, on a window seat, with his arm resting on the sill. The upper part of the arm naturally projected a little, and just before the accident he was turning to the window to spit, which may have caused the arm to project a little further. But whether it was five or seven inches outside the window appears to me to be of no consequence. The second plaintiff makes a like case for himself. And again the extent to which the limb was outside the window seems unimportant; though it might be important for the defendant to show that he had opened the door while the train was on the track and not in a station, and so voluntarily exposed himself to an unusual risk.

The defendant Company denies, first, that it was in any way guilty of negligence. I had better, therefore, deal with that contention. If it be found in the defendant's favour, there is an end of the case. The defendant alleges that before the Nagpur down mail left Victoria Terminus the guard in charge of the train went down its whole length closing the doors. It is to be observed that while the train lay at the platform the doors on the platform side were the doors which became the off-side doors as soon as the train was on the open track. There is a statutory obligation on the Company to close all doors. This they say they did. They go further and point to their own rules by which guards are ordered not only to close but lock all doors on the off-side. Kinsley, the guard in charge of the mail, swears that he entered the carriage to which the door which caused the injuries belongs. It was a compartment reserved for ladies. It was unoccupied. Accordingly, he swears that he put the shutters up, got out, closed and locked the door. He remembers having done this distinctly. Munro, the rear guard, Kinsley's subordinate, corroborates him. He swears that he saw Kinsley going down the train closing and locking the doors. Dr. Fonseca, a passenger by the train, has also been called to swear to this. But I cannot attach much value to his evidence. It is quite possible that he may have seen Kinsley closing some doors and yet not have seen him close this door. This evidence shows that all the off-side doors were closed and locked in three minutes or so before the train started. I confess it seems to me

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a little doubtful whether that would prove conclusively that the doors were all closed and locked when the train started. Certainly it would not in England, where belated passengers seek to enter trains up to the last moment, and railway officials may open doors that have been closed to let them in, and forget to close and lock them again. In the particular case, however, there were no lady passengers and the compartment was, in fact, empty. It is still possible that after Kinsley closed and locked the door, assuming that he did, some passengers got a member of the platform staff to open it for him, and then finding it was a lady's reserved compartment, rushed off, and so the door got left open. The alternative suggestion that a passenger with a railway key came up, opened the door, and left it open seems to me too improbable. The truth appears to me to lie between two possibilities neither of which is highly improbable. The first is that Kinsley is mistaken, and thought he had closed and locked this door, but had not. The other is that, after he had done so, some member of the railway staff opened the door and forgot to close it. In either case, there would be evidence of negligence to go to a Jury. The fact that a door on a moving train is open, is evidence of negligence on the part of the Company: *Gee v. Metropolitan Railway Company*⁽¹⁾; *Richards v. Great Eastern Railway Company*⁽²⁾. Evidence only, be it observed, is not necessarily a conclusive proof. And a very great Judge doubted whether the fact alone ought to be even evidence of negligence. Taking that, however, to be settled as matter of law, I should find on this point that there was negligence on the part of the Company in respect of the open door on carriage 1846 of the Nagpur down mail. For, whether Kinsley forgot or omitted to close and lock the door, or whether another servant of the Company opened it after Kinsley had locked it and forgot to close it, I apprehend that the Company would be equally affected with negligence. It is not alleged by the plaintiffs that there was any defect in the lock or catch of the door, so that once it was closed and locked it could not possibly have opened of itself. And it is not the Company's case that any one unauthorizedly opened it after the train had left Victoria Terminus. I do not

(1) (1873) L. R. 8 Q. B. 161.

(2) (1873) 28 L. T. N. S. 711.

accept the suggestion that any one did so unauthorizedly by the use of a private railway key in the three minutes which intervened between Kinsley having, as he swears, closed and locked the door and the train starting.

That, then, must be taken to be my first finding of fact upon the evidence. I do not wish to reflect in any way upon the honesty of either Kinsley or Munro. But it is plain that Kinsley was bound to swear what he did, and it is quite possible that he may have sworn the truth, just as it is quite possible that he may have been mistaken, without shaking my conclusion. As to Munro, I have no doubt that he has told the truth to the limit of his knowledge and belief.

I will now deal with the next question of law which has given rise to a great deal of argument and minute analysis of measurements. Briefly, I take the rule of law to be that where there is a statutory obligation, any breach of that which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach of the duty must, in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence. If I am right, the result will show that this part of the case is of little importance. The plaintiffs' contention is that the dimensions of carriages were exceeded. The defendants reply that they were within their circulars of 1896 and 1905 and that the latter read with the special sanction obtained in 1904, completely covers them. The plaintiffs meet this by alleging that the sanction and circulars are all to be read with the orders regulating the minimum width of central track. Thus when the Company were permitted to widen their carriages to ten feet, that permission was conditioned by a minimum width of twelve feet, and a recommended width of fourteen feet between central track points. Whereas in fact the Company widened their carriages without widening their track. The result of this was to narrow the distance between passing trains from a minimum of three feet five or six inches to a minimum of about two feet six inches at the outside. Assuming, for the sake of argument, though I am not prepared to hold that it is so, that the plaintiffs are right, then while no doubt the breach of the statutory obligation, coupled with the negligent act of the defendant in leaving the door open con-

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tributed to the accident, it was not in itself the cause of the accident, nor could it alone have caused the accident. As a special legal argument, then, standing alone, this appears to me to lose all point. It is left to be a factor of the whole negligence charged upon the defendant which the plaintiff must prove. And it is therefore, in my opinion, quite unnecessary to go into all the minutiae of the measurements and the terms of the circulars and sanction. The defendant Company admits that in the existing state of the track, the carriages being of their actual dimensions, when the door swung open, it reached to within four and a half inches of the limit of the crossing carriages. (I am not particular to the fraction of an inch because, in my opinion, that makes no real difference and I therefore say, roughly, four and a half inches) Now the defendant's case is that it is only bound to carry its passengers safely inside the carriages provided for their use. No obligation whatever lies upon it to look to their safety if they get outside the carriages. Therefore, it being admitted that the plaintiffs sustained their injuries outside the limits of the carriage or carriages in which they were travelling, they took their own risk and the defendant Company is in no way responsible. If that proposition is correct, it is plain that there is an end of the case. For no matter how near the open door of carriage 1846 came to the surface exteriors of carriages on the up local, no matter what negligence the Company was guilty of in leaving that door open, no matter how much or how little they had exceeded the dimensions prescribed by statute, no injury could possibly have been done to the plaintiffs had they kept within the carriages provided for them. And this brings me to a consideration of the very difficult question of contributory negligence.

The defendant's case is that a passenger, who puts any part of his person outside the carriage and receives an injury to the part so extruded, is guilty not only of negligence by putting himself outside the carriage but of contributory negligence which disentitles him to recover against the Company, provided that, no matter what negligence the Company has been guilty of, that could not have caused the passenger any injury so long as he remained inside the carriage. The plaintiffs, on the

other hand, contend that resting their arms on the sills of the windows was as ordinary natural every-day act, which was not even negligence, and certainly could not have been contributory negligence disentitling them to recover for injuries done to them in such positions by an act of negligence on the part of the defendant Company. It will probably be seen that these contentions approach the central question from different points; the Company appears to rest mainly upon its contractual obligations, the plaintiffs on the general principles of the common law. We contracted, say the defendants, to carry passengers inside and not outside our carriages. If they put themselves outside the carriages they exceeded their rights under our contract, and were to that extent mere trespassers. We cannot be made answerable for any injuries which they courted, and actually suffered by such unauthorized acts. The plaintiffs reply, we had a right to be carried safely, and to be protected against all ordinary and expected risks. A person is not bound to do more than look out for what ordinarily happens; he is not bound to guard against wholly unusual and unforeseen contingencies. Such a contingency was the open door of a passing train. No one can be expected to anticipate that a train will pass at speed with a door wide open, reaching to within four and a half inches of the windows of another train. In placing our arms on the sills of the windows, we did what millions of passengers in this country do every day, on the same track, with perfect safety. Our acts in themselves were not negligent. They were common every-day acts; every one does them; and not one in twenty million has ever incurred or been supposed to incur any risk by doing them. It is this possibility of putting the case in different ways, looking at it from different points of view, involving the application of different principles, that makes the decision difficult.

The general rule was thus stated by Baron Alderson in *Blyth v. Birmingham Waterworks Company*⁽¹⁾. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of

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(1) (1856) 11 Ex. 781 at p. 784.

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human affairs, would do, or doing something which a prudent and reasonable man would not do." It was not necessary for him to state (goes on Pollock in his work on Torts), but we have always to remember that negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care. This, it will be observed, says nothing of the party's state of mind; and rightly. Jurisprudence is not psychology, and law disregards many psychological distinctions, not because lawyers are ignorant of their existence, but because for legal purposes it is impracticable or useless to regard them. This is the kind of ground which the plaintiffs would take. They would allege, and I cannot help feeling with great show of reason, that the circumstances were not such as to impose upon them the duty of taking special care. They would say, all passengers in this country sitting by open windows on an open track are, and have always been, in the habit of resting their arms for comfort or convenience on the sills of the windows. The distance between the tracks if maintained and not invaded by some object which never ought to have been there, and the presence of which could not possibly have been anticipated, makes this practice so perfectly safe, it has been so firmly established, that no passenger ought to be affected with a false kind of contractual negligence merely because he followed it, and, owing to an utterly unforeseen piece of negligence on the part of the Railway Company, was seriously injured. Before going, as shortly as may be, into the case-law, I will mention the philosophical ground of the doctrine of contributory negligence derived by philosophical jurists from Aristotle. The four categories of causation are—

(1) The essence of formal cause. That would, I suppose, in the present case, be the actual contact of the door with the arms of the plaintiffs.

(2) The necessitating conditions or the material cause. These would be the open door, and the arms of the passengers within its reach.

(3) The proximate mover, the efficient cause.

(4) The final cause, that for the sake of which the act was done. The last category has no bearing upon a question of this kind, being restricted, as I understand, to motive and therefore to the intentional acts of sentient beings.

The doctrine of contributory negligence resolves itself into the second and third categories and the determination upon all the factors found existing within them of the question which of these factors was the efficient cause? A plaintiff's act may make one of the necessitating conditions, and so be negligence. But to take it further and convert it into contributory negligence, it must further be found to have been the efficient cause of the accident.

Then the text-book writers and the Judges have deduced a rule of practice, which may be roughly stated thus. Where there is negligence on both sides, the test to be applied in trying to find out which was the efficient cause is, who had the last chance of averting the accident? A consideration, however, of the numerous cases giving rise to an enquiry into contributory negligence will show that this rule, though sometimes of great use, cannot be made universally applicable. In the present instance, since the plaintiff at any rate could hardly in fairness be deemed to have known that the door which injured him was open, how was he to avert the accident? True he had, in one sense, the last chance of doing so, but merely on the supposition that neither he nor the defendant knew that the danger existed. If the defendant knew that the door was open, it would be as fair to say that they should have stopped their train as that the plaintiff should have pulled in his arm. I apprehend that the application of the rule must be restricted to cases in which both parties or one party at any rate is in fact aware of the danger before the accident actually happens. I will now deal with some of the authorities. I take this opportunity of thanking Mr. Baptista for the great industry he has shown in collecting every case which has any bearing on the point, his ability in commenting upon them and the text-book writers and the zeal and thoroughness which he has shown in presenting his clients' cases to the Court. I may frankly add that my

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sympathies have been throughout and still are with the plaintiffs. I cannot help feeling that these poor men, doing what their fellows have always done with impunity, very naturally believe that they are entitled to the protection of the law when they find that, owing to an utterly unforeseen occurrence, they are maimed for life or seriously injured; and if the law should turn out to be against them, I still think that the sense of most average men would be with them on the general merits of their grievance. On the other hand, I can quite understand that the Company is obliged to lay aside all sentimental considerations when a principle, so far-reaching and of such vital importance to the conduct of their business, is at stake. But for that, I do not doubt that common humanity would have impelled them to offer some compensation at any rate to these poor men whose injuries, whatever the strict legal rights of the parties may be, were, no doubt, caused by the Company's negligent act. But a Judge has nothing to do one way or the other with sentiment. My duty is to find out, if I can, what the law enjoins and keep myself strictly to that.

Now, it is a singular thing that, notwithstanding the millions and millions of passengers who have travelled over railway lines in England, and the doubtless innumerable instances of putting parts of their persons outside the carriage windows, the point I have to decide is absolutely, as far as English Courts go, *res integra*. There is not a single reported case of the kind. No passenger in England has ever sustained injuries in this way, or, if he has, has sued to recover damages from the Company for them. Two of the State Courts of America have considered the question. The Pennsylvanian Court has held that the Company is liable, "where the road is so narrow as to endanger projecting limbs, unless the windows of the cars are so barricaded with bars as to render it impossible for the passenger to put his limbs outside the window." *New Jersey Railroad Co. v. Kennard*⁽¹⁾. Stripped of the rather ambiguous language in which the principle of liability is stated (which I quote from Beven), this amounts

(1) 21 Pa. St. 283.

to fixing the Company with liability in every case where the road is so narrow as to endanger passengers who may put their limbs out of the carriage. For the remainder of the qualification amounts to this only, that no accident could have happened. Of course, if the Company make it impossible for a passenger to put his arm or hand out of the window, he could not possibly receive any injury by doing that which is, *ex hypothesi*, impossible. Waiving that and going to the more intelligible ground of the decision, it seems to me to really go all the way, and impose upon the Company the duty of making accidents of the kind impossible, or if the Company cannot do that, then of imposing upon them liability for the consequences. If the track is so wide that putting an arm or hand out of the window could not bring about an accident, there could be no liability upon the Company, because there could be no accident. But taking the sense of the decision, I think that it is clearly in favour of the plaintiffs. For what the Court fixed its mind upon was the risk to the passengers from a standing and permanent peril—the narrowness of the track. If the Company did not or could not guard against that, it was liable. *A fortiori*, it would be liable for a peril independent altogether of the width of the track and against which it could guard. Such for example, as allowing a train to start on a double track with one of its doors wide upon. On the other hand, the Massachusetts Court decided that there was no liability in such circumstances upon the Railway Company. That Court has adopted the rule, that if a passenger's elbow extends through the window beyond the place where the sash would have been if the window had been shut, the passenger's conduct would indicate such carelessness as would disentitle him from recovering. *Todd v. Old Colony &c. Railroad Co.*⁽¹⁾. Upon this Beven comments: "The point has not arisen in England, where there is no reason to doubt that, should it, the Massachusetts rule would be adopted." And he adds that since the above was in type, *Simon v. London General Omnibus Company*⁽²⁾ and *Hase v. London General Omnibus Company*⁽³⁾ have

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(1) 89 Mass. 207.

(2) (1907) 23 T. L. R. 463.

(3) (1907) 23 T. L. R. 616.

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been decided in accordance with the above forecast. I entertain some doubt whether this is a strictly accurate application of the rulings in those two recent cases. In the first place, there appears to me to be a clear distinction between the case of a man in a railway carriage travelling on an open track, and that of a man on an omnibus, which, every one knows, has to thread dense traffic and frequently risk close shaving. Referred back to the general fundamental principle of negligence, it might be doubted whether the same kind of duty, or at any rate, a duty of the same degree, is imposed upon persons respectively so situated. What might be ordinary and reasonable care in the one case might fall far short of it in the other. A man on an omnibus knows that he will be constantly at varying distances from vehicles and pavement structures, that at any moment he may be brought into almost actual contact with them. A man in a railway carriage does not know this. He expects—every one expects—that the track distances will, on an open line, be maintained, and that nothing will come much nearer to him than the face of a passing train. Again, he knows that in all ordinary circumstances that will be some distance away from him, certainly more than a few inches. This is a matter of common every-day experience on which passengers, who are to be judged by the standard of ordinary reasonable care and prudence, may well claim to rely. That is one reason why I think the two omnibus cases do not as fully make good Beven's forecast as that eminent writer is disposed to think. Another reason is that in both these cases the Omnibus Company was found in fact not to have been guilty of any negligence at all. In one case the passenger was actually within the limits of the omnibus and was injured by a projection from some structure on the pavement. It was held that the driver could not have known of this, and, in taking the course he did, acted with perfect propriety. The resultant injury in that case had to be put down to unavertable accident. In the other case the passenger leant over the rail of the omnibus, and again it was held that the course the driver took was perfectly proper and there was no negligence at all on the part of the defendant.

Company. These cases, therefore, are distinguishable and the point I am to determine is, in my opinion, entirely *res integra*, except for the American decisions. True, there is the great weight of Beven's own authority. The opinion of a text-book writer is not binding on any Court. But where he is of such eminence as Beven, there can be little doubt that the expression of his opinion in this book has contributed to the absence of all claims like the present being formulated in the English Courts. Further, while I admit that Beven's opinion does not bind me, I set a high value on it, as the considered opinion of a very profound and philosophical student of this particular branch of the law and an authority amongst text-book writers of the first eminence. The nearest case to this is a Scotch case—*Pirie v. Caledonian Railway Company* ⁽¹⁾. There a woman seized with sudden illness put her head out of the carriage window and was killed by a mail bag on an apparatus put up by the Company to give facilities to the Post Master-General for putting the mails on and off trains. The case was much relied on by the defendant Company. But it appears to me that, standing alone, it is about as favourable to the one side as to the other. The Jury found for the Company. But it was never thought, I believe, that the decision went so far as to cover every case in which a passenger might put his head out of a train window and so sustain injuries. The facts were very special and Lord Adam's direction to the Jury shows that the verdict really turned upon the reasonableness or otherwise of the manner and extent to which the Company had complied with the Post Master-General's requisitions. Beven says: "The case must not be stretched to the length of inferring that in all cases a passenger thrusting his head out of window will be disentitled to recover in the event of injury happening to him through doing so". I confess that I find some difficulty in reconciling this expression of opinion with that which shortly preceded it, that a passenger putting his arm through the window does so at his own risk, and that there can be no doubt that the English Courts, should such a case come before them, would follow the rule of the Massachusetts Courts and disallow the plaintiff's claim.

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Adams v. Lancashire and Yorkshire Railway Co.⁽¹⁾ was decided on the ground that the injury was not the necessary consequence of the Company's negligence in leaving the door open. It was afterwards much reflected upon and has little bearing on the present case.

In *Gee v. Metropolitan Railway Company*⁽²⁾, the facts were that the plaintiff got up and placed his hand on the door in order to look out at the lights of an approaching station. The door flew open, the plaintiff fell out and was injured. The case was argued on a rule before the Exchequer Chamber, and Kelly C. B. laid it down that there was not only evidence of negligence on the part of the defendant Company but evidence of liability (which is a different thing) to go to the Jury; further, that there was no question of contributory negligence raised on the rule, so that was not to be considered. Martin B. thought that there was a question of contributory negligence which was properly left to the Jury. And his observations on the point are instructive. He relies a good deal upon the railway being an under-ground railway, where there is little to look at but walls, and also upon the windows being barred, thereby warning passengers that there was danger in putting their heads or hands out of the windows. He says: "Therefore it seems to me that you cannot possibly shut out from the consideration of the Jury, whether or not a man may not do wrong and know that he is doing wrong in putting his head or hand out of the window." As I understand the gist of that learned Judge's remarks, even had the passenger put his head or hand out of the window, that would have been matter proper to be left to the Jury on a plea of contributory negligence and ought not to have been withheld from the Jury as matter of law conclusively disentitling the plaintiff from recovering. The whole of Brett J.'s judgment is useful. He says "was there evidence that it (*i.e.*, the Company's negligence) was the sole cause? Now that becomes somewhat complicated. If during the plaintiff's case an act of his was proved, which was so clearly contributory to the accident, that it would be unreasonable for any reasonable man to find to the contrary, and if that act was so clearly a negligent act that it

(1) (1893) L. R. 4 C. P. 730.

(2) (1873) L. R. 8 Q. B. 161.

would be unreasonable in reasonable men to find that it was not negligence, so that any Court would, upon either of those points, immediately set aside a verdict of the Jury, finding the contrary of either, I am not prepared to say that the Judge might not then rule that the plaintiff had failed to put forward evidence upon which a Jury might find in his favour that the accident was solely caused by the defendant's negligence." Now this appears to me hard to reconcile with what had already fallen from Kelly C. B. and Martin B. For if merely putting a head or hand out of window is negligence of the kind indicated by Brett J., then that fact being proved, would justify a Court in withholding the question from the Jury and at once non-suiting the plaintiff. This was what the Scotch Court did in another case. In *Toal v North British Railway Company*⁽¹⁾, the pursuer complained that while standing on the platform of one of the Company's stations, one of their trains was set in motion, with a carriage door open, and that the door struck and injured him. The Court of Session non-suited the pursuer on the ground that there was no relevant averment. This, however, was reversed in the Lords. I only mention this case, otherwise having no bearing on my present enquiry, as an illustration of the length to which the Scotch Courts will go in deciding upon the pleadings; whether or not there are facts to be laid before a Jury at all; possibly, therefore, useful in considering whether, when the plaintiff admits that he was travelling with a part of his person outside the carriage, any injury to that part would entitle him to maintain an action for damages against the Company.

Richards v. Great Eastern Railway Company⁽²⁾, is a case following *Gee v. The Metropolitan Railway Company*⁽³⁾, and the two cases together seem to me to be direct authority for this proposition and this proposition only, that the fact of a door being open on a train is evidence of negligence on the part of the Company.

Graham v. North Eastern Railway Company⁽⁴⁾ was the case of a guard on a dominant railway, who suffered injuries to his head

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(1) [1908] A. C. 352.

(3) (1873) L. R. 8 Q. B. 161.

(2) (1873) 23 L. T. N. S. 711.

(4) (1865) 18 C. B. N. S. 229.

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from a post on the servient railway while looking out in the discharge of his duty. The ground of the decision against the defendant Company was the Jury's finding of fact that the post was put up in a position dangerous to a guard whose duty it was to look out of his van. It cannot be inferred from this that the decision or the Jury's verdict would have been the same had the guard been under no obligation to look out. Passengers are under no such obligation. But read with some of Beven's own observations on the Scotch case of *Pirie v. Caledonian Railway Company*⁽¹⁾, an impression may be created that a Company is bound not to construct its track in such a way as to be a trap for unwary passengers. So that were an injury occasioned to a passenger whose head or arm was out of the window by some structure on the track, which came very close to the window, and could fairly be regarded as a trap, it would appear that Beven would qualify, or might qualify, the opinion he has expressed against the right of passengers, who extrude any portion of their persons from the carriage, to recover for injury. For this rule must be uniform and reducible to a definite principle if it is to be a rule at all. It could not be a rule, and yet susceptible to modification in such cases as Beven suggests. Nor would its application in such circumstances, as far as I can see, be helped by adding that if the Company built a line full of such traps, its construction as a whole would be deemed to be negligent and careless. For, *ex hypothesi*, if the passenger did not put any part of his person out of the window, no number of such traps, no degree of propinquity could possibly cause him an injury. These appear to me to be the only cases which have anything like a direct bearing on the present question.

Dublin, Wicklow, and Wexford Railway Company v. Slattery⁽²⁾ decided that there was evidence to go to a Jury on a disputed question of fact, though several of the learned Judges of appeal thought that on the facts alleged by the plaintiff himself there was not. The plaintiff was crossing the line at a place where this was forbidden. He was caught and killed by the incoming express. The express was bound to whistle, and the engine

(1) (1907) 17 Rottia 1108.

(2) (1878) 3 App. Cas. 1155.

driver swore that he had whistled twice, other servants of the Company supported him. The plaintiff's evidence was that if the whistle had been sounded they must have heard it but did not. Apart from that, the point of interest was that where there was evidence that notwithstanding the Company had put up warnings and prohibitions, these were consistently disregarded, and no effort was made to enforce them, that too was evidence to go to a Jury. In this case the defendant Company contends that it put notices in the compartments with the words "Do not lean out of the window" legibly written in English. Evidence too has been given that the guards of the Company frequently tell passengers who are leaning out of window not to do so.

In *Hanson v. Lancashire and Yorkshire Railway Company*⁽¹⁾ the plaintiff was injured while sitting in his carriage by a projecting piece of timber which was being carried on a passing goods train. The timber was loaded on a truck secured by a chain only, and not in the best way by stanchions. The question was whether the plaintiff had successfully proved negligence. The mere happening of the accident was thought not to be sufficient. That early doctrine was founded on a decision of Lord Denman in *Carpue v. London and Brighton Railway Company*⁽²⁾. In some cases *res ipsa loquitur*, the accident may be of such a nature that negligence may be presumed from the mere occurrence of it. But when the balance is even, the onus is on the party who relies on the negligence of the other to turn the scale. That is now, I think, the accepted rule. And here while the swinging door might be thought at first to be a strong instance of *res ipsa loquitur*, the Company's defence has to be taken into account. It then appears that if that defence is sound, it was not the open door which was the cause of the accident at all, but the fact that the passengers were outside and not inside their carriages. If they had been inside the door might have swung as it did and done them no harm. Had the door struck the compartments and so caused injury to the passengers inside, then, indeed, I think, that the Company would have had to admit that

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res ipsa loquitur and would have found it hard to plead that there was no negligence on their part, which being the cause of the accident rendered them liable to the persons injured.

The next case cited by Mr. Baptista is *Cooke v. Midland Great Western Railway of Ireland*⁽¹⁾. Here the Company kept a turntable unlocked and therefore dangerous to the children near a public road. The children obtained access to the turntable through a well-worn gap in a hedge which the Company were bound by Statute to keep in repair. A child playing on the turntable was seriously injured and it was held that there was evidence of actionable negligence on the part of the Railway Company. It was found that there was a gap in the hedge although the Company were bound by Act of Parliament to maintain the hedge, but it was also held that this mere breach of the statutory obligation was not the effective cause of the accident.

David v. Brannan Merthyr Coal Company⁽²⁾ was a case under the Coal Mines Regulation Act, and the Court held that a breach of the statutory duties imposed by that Act rendered the defendant Company liable for negligence without special proof of particular personal negligence. But there the injury was directly caused by the breach of the obligation.

In *McCawley v. Furness Railway Company*⁽³⁾ it was held that the plaintiff, a drover who was carried free at his own risk, according to his contract with the Company could not recover for an injury, although it was alleged to have been caused by the "gross and wilful negligence of the Company." The principle of this decision may be extended to such a case as the defendant Company here relies on; for if it be truly a part of the implied agreement between passengers and the Company that the former are to be carried inside and not outside the carriages, then it appears to me that if they insist upon putting themselves outside the carriages they do so at their own risk like the drover McCawley, save only that he consented to take all risks inside or outside the carriages in which he was travelling. This

(1) [1909] A. C. 229.

(2) [1909] 2 K. B. 146.

(3) (1872) L. R. 8 Q. B. 57.

decision brings into strong relief the contractual basis of the respective rights and liabilities of passengers and carriers. And it goes some way at least towards confirming the defendant's contention, that in questions of this kind, no liability at all can be fixed on the Company which they did not contract themselves into.

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Crocker v. Banks⁽¹⁾ was the case of a girl employed in a soda water manufactory. She was injured by the explosion of a bottle. She had been warned to wear a mask and such masks were provided. Nevertheless, the Company defendant was held liable, although the plaintiff had neglected to put on the protecting mask. This case is cited, I suppose, to show that the defendant Company here cannot evade liability on the ground that they had put up notices warning passengers not to lean out of the windows, and had also barred the windows. It was said by the Master of the Rolls in giving judgment that the precautions which the defendant had taken showed that he was aware of the danger. And an argument from that is directed against the Company. It was held not to be contributory negligence on the part of the plaintiff that she had refused to obey the caution and avail herself of the protection of the mask. So here, I suppose, it might be contended that it was not contributory negligence on the part of the plaintiffs to disregard the notice in the carriage and ignore what was implied by putting bars across the window. But I do not think that the analogy is very close, or the authority directly in point. Much in *Crocker v. Banks*⁽¹⁾ appears to have turned on the tender age of the plaintiff. Further, it does not appear to have been decided on the basis of a strict and defined contractual relation.

Blyth v. Birmingham Water-works⁽²⁾ was a case of injury caused to the plaintiff by the bursting of some of the defendant's pipes under pressure of extreme cold. I do not think it has much bearing on this question. It was cited, I believe, in support of the same general argument as that which was founded on the preceding case. The judgment of Alderson B., however,

(1) (1888) 4 T. L. R. 324.

(2) (1856) 11 Ex. 781.

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contains the general definition of negligence which has met with the approval of subsequent text-book writers, and on which the plaintiffs here rely.

In *Wakelin v. London and South Western Railway of Ireland*⁽¹⁾ it was held that, assuming there was negligence on the part of the defendant Company, there was no evidence to go to a jury connecting that negligence with the death of the man killed at the level-crossing. There are weighty observations by Lord Watson in giving judgment which, I think, I may quote with advantage. "It appears to me that in all such cases the liability of the defendant Company must rest upon these facts,—in the first place that there was some negligent act or omission on the part of the Company or their servants which materially contributed to the injury or death complained of, and, in the second place, that there was no contributory negligence on the part of the injured or deceased person. But it does not, in my opinion, necessarily follow that the whole burden of proof is cast upon the plaintiff. That it lies with the plaintiff to prove the first of these propositions does not admit of dispute. Mere allegation or proof that the Company were guilty of negligence is altogether irrelevant; they might be guilty of many negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection whatever with the injury for which redress is sought, and therefore the plaintiff must allege and prove, not merely that they were negligent, but that their negligence caused or materially contributed to the injury." Now, applying those observations to the facts here, we may go so far as to hold that the plaintiff has proved an act of negligence which (apart from the strict contractual relations set up by the defendant) materially contributed to the injury. But it only contributed "materially" or, for that matter at all, because of a breach on the plaintiff's part of his contractual obligation to remain inside the carriage, it apart from that breach there would have been no material contribution to the accident by the defendant because there could have been no accident at all, the bearing of these remarks, at any rate so far as they might be

(1) (1886) 12 App. Cas. 41.

supposed to favour the plaintiff, appears to me to be entirely changed. Lord Watson goes on.—“If the plaintiff’s evidence were sufficient to shew that the negligence of the defendants did materially contribute to the injury, and threw no light upon the question of the injured party’s negligence, then I should be of opinion that, in the absence of any counter-evidence from the defendants, it ought to be presumed that, in point of fact, there was no such contributory negligence.” Those remarks were made with reference to the facts of that case. The man who was killed was found dead on the line, and no one knew how the accident had happened. But that is not the case here. For the Court is in full possession of every fact. The Court knows exactly how this accident happened. It happened owing to two contributing causes: the door of the down mail being open, and the arms of the plaintiffs being out of the windows of the up local. The only question, therefore, here is whether the latter circumstance is to be taken as the efficient cause of the accident? There is no question here of the shifting of the onus of proof, which was the point most debated in *Wakelin v. London and South Western Railway of Ireland*⁽¹⁾, for all the facts have been virtually admitted from the commencement, excepting, of course, the manner in which the door came to be opened, and the precise extent to which the plaintiff’s limbs protruded.

In *Cockle v. London and South-Eastern Railway Company*⁽²⁾, the Judges appear to have taken different views of the liability of a railway company, in such circumstances as were there disclosed. This, however, was the case of an alighting passenger, and different principles apply. I do not think it needs any further notice.

Now if I turn to some older cases, I find that Parke B. laid it down in *Bridge v. The Grand Junction Railway Company*⁽³⁾, approving *Butterfield v. Forrester*⁽⁴⁾, “there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*⁽⁴⁾, and that rule is, that,

(1) (1876) 12 App. Cas. 41.

(2) (1870) L. R. 5 C. P. 457.

(3) (1838) 3 M. & W. 244.

(4) (1809) 11 East 60.

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although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind."

In *Scott v. London Dock Company*⁽¹⁾ it was held in the Exchequer Chamber by a majority of the Judges that "in an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant a Judge in leaving the case to the jury. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Arguing from that case, which was a dockyard case, where an inspector was injured by six bags of stuff falling on him, the plaintiffs might, I suppose, say that here the door of the down mail was in the management of the defendants, and that what happened was what does not ordinarily happen, and so forth. But although I see that arguments of that kind may be drawn from many of these cases, I miss in all of them the one point of identity with the present case which I so anxiously seek. These are not cases founded on the contractual relation of the defendant to the plaintiff and the resulting obligation to do certain things and avoid doing certain things, and not others, which are not in the scope of the risk fairly raised by the understood terms of the contract.

I might indefinitely extend this examination of the case-law. I have carried it this length rather to satisfy the plaintiffs and leave them no room to think that the Court has not given the fullest and most careful attention to every point in their case, than for any practical use, to which I feel I shall be able to put

(1) (1865) 3 H. & C. 596.

For, after studying these and many other cases, as well as the dicta of the text-book writers, the point I have to decide appears to me to remain precisely where it was—unamplified, unilluminated. We have these facts. Passengers in this country habitually and almost universally travel with their arms thrust out of the windows of their crowded compartments; not infrequently they thrust their heads out too. When they are sitting by windows it is almost impossible for them to help resting their arms on the sills, and when they do this some part, at least, of their arms must project outside the limits of the carriage. Before the new type of carriage was introduced, they could do this, in reason, with perfect safety. For other projecting parts of the carriages would have afforded them complete protection against such an accident as has overtaken these unfortunate plaintiffs. But with the new type of corridor car the conditions have changed. There is nothing outside the car to shelter limbs against passing objects. So far, then, as the simple rule of observing ordinary care goes, the plaintiffs may quite fairly claim to be within it. Indeed, as I have said, any number of passenger might do what these passengers did any number of times and come to no harm.

But although they may do this at their own risk and usually with impunity, ought they to do it, and if they do it, and are injured, can they make the Company liable to compensate them? The Company has put up notices forbidding passengers to “lean out of the windows.” And I think that no distinction can fairly be drawn to the Company’s disadvantage between “leaning out” and putting arms or heads out.

Again, the Company have placed bars across these windows. The bars are not close enough to prevent passengers protruding their arms. But they would be a warning. Men of sense might suppose that the Company would not bar the windows were there no risk at all, if travellers chose to loll out of them. Again, whatever may be said of the limits of reasonable care and prudent conduct while the train is running on an open track alone, the conditions are changed as soon as another train crosses. Ordinarily the most rash and curious English traveller, who, as

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long as there is no apparent risk of that kind menacing him, will lean out of window to admire the view, instinctively draws himself well within the compartment while another train is passing. True he has every reason to believe that nothing on that train will reach his carriage window; he may rely upon the Company seeing to that. But however that may be, instinct seems to side with the strict rule of contract and remind him that he ought to be inside and not outside his carriage. For no human foresight and care are infallible. Such an accident as an unfastened door is always a possibility—a remote possibility. But the English traveller would not take the chance. He would almost certainly draw back into his carriage the moment he knew that another train was about to pass him. Indians are differently constituted. They have not, perhaps, had the same amount of experience, and the conditions of travelling by train in this country are different from those which obtain in a country like England or America. So that perhaps the same instinct of self-preservation has not yet been developed in the average Indian passenger. But is the Company to know and reckon with this? The point is of vital importance to the defendant Company and to all railway companies in this country; it is essential that they should have a clear decision upon it—a decision, too, upon the principle for which the defendant here contends. The true issue comes to this—is the defendant Company liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling? To decide the case upon any other ground, any ground less sharply defined than that, would defeat the object with which alone, I believe and hope, the defendant Company has contested the plaintiffs' claims. In my opinion the defendant is not liable. I cannot whittle away the principle of this decision by any qualifying words. It must stand or fall upon its own principle. And that principle, if it be good law, would set all questions of this kind for ever at rest. If Courts attempt to refine upon it by qualifying words and phrases such as that passengers may extrude their limbs in reason, or anything of that kind, there will be no end to disputes. But if it be once held that a passenger has no right of action against a railway Company for injuries suffered to any part of his person volun-

tarily placed at the moment the injury was inflicted outside the carriage, all future uncertainty is dispelled, and I do not doubt a vast amount of litigation will be averted. I cannot allow, if the principle is sound, that a passenger is in any better case if he puts half an inch of his person only outside the carriage, than if he puts a yard of himself outside. If any distinction of that kind are admissible at all, I should say at once that this is a case in which the plaintiffs were entitled to the full benefit of them. I do not believe that even the second plaintiff was standing outside the carriage as the defendant contends. I am quite prepared to accept his own account of the manner in which he came to be so seriously hurt. I do not attach any weight to the evidence led by the defendant Company to prove that he had opened the door and was standing with virtually his whole arm outside the carriage. I do not think the witnesses who speak to this would have been in the least likely to have observed what the second plaintiff was doing. Besides, had he been so standing with the door open and facing the approaching train, I can hardly believe that he would not have noticed the swinging door and withdrawn himself into safety. The case of the first plaintiff is plain. I have no doubt that he has spoken the truth. I am quite prepared to accept his story and his brother's measurements. I will take it to be the fact that his arm was not more than five inches or so at most outside the window. According to the principle upon which I am deciding, that makes no difference at all. His arm ought not to have been outside at all, not the fraction of an inch. Now, accepting the principle as the basis of this rule of law, that a passenger must travel inside and not outside his compartment, and therefore that if he does travel outside, he does so entirely at his own risk and the Company cannot be held liable for any injury which he suffers in consequence, it comes to this, that a passenger who gets injured owing to putting any part of his person outside his carriage is guilty of contributory negligence. And it would follow that where the plaintiff admitted that he had incurred the injury in this way, no matter what negligence there might be on the part of the Company, he would have no case to lay before a Jury. The Judge would be bound to enter a verdict

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for the defendant on the pleadings. And that I take to be the true law, notwithstanding the apparently conflicting dicta of many of our most eminent Judges, to which I have already referred. Supposing I am wrong here, and that this is a case which in England ought to be left to a Jury, then the further question would arise, whether the accident was caused by the negligence of the plaintiff in putting himself in a position of risk, or to the negligence of the defendant. In this particular case were that question to be tried by me as it would be tried by an ordinary Jury, I should hesitate long before I decided that the plaintiffs were not entitled to compensation. I am pretty sure that any average English Jury would find that they were. And if I were not bound by any rule of law such as I have enunciated, which restricts the Company's liability for accidents to such as happen to passengers inside their compartments, were I merely to treat the case on general principles of ordinary prudence and average conduct, I think that I should find that the accident was caused by the negligence of the Company, and not by the negligence of the plaintiffs. I do not feel at liberty to give effect to that strong leaning of my own mind. I cannot resist the conviction that the principle upon which the defence to this claim is based, is the true principle. And while on the one hand it may appear to work great hardship on these unfortunate men, on the other any derogation from it (if it really be the law, as I believe that it is) would expose all railway companies to unfair risk, harassment, and expense. There are two sentimental sides even to this particular case, though railway companies are little in the habit of expecting, still less of receiving, sentimental indulgence.

I must therefore hold, looking to the peculiar obligations under which a railway company lies—essentially, as I understand, contractual obligations—that their liability in these two suits is discharged by the admitted facts that the injuries complained of could not have been suffered had the plaintiffs remained inside the carriages in which they were travelling. It therefore becomes unnecessary to go into the question of damages. Looking to all the circumstances of the case, bearing in mind that it is a new point upon which the plaintiffs might very reason-

ably have expected in this country, at any rate, to succeed, looking too to the injuries they have suffered, I think that it will be fair while dismissing their suits against the defendant Company to leave all parties to bear their own costs.

Attorney for the plaintiffs: *S. B. Mehta.*

Attorney for the defendants: Messrs. *Little & Co.*

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GADIGEYA, ADOPTIVE FATHER ADIVEYA HIREMATH (ORIGINAL PLAINTIFF), APPELLANT, v. BASAYA BIN MALLAYA RAPATI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1910.
February 7.

Regulation II of 1837, section 21—Caste question—Civil Court Jurisdiction—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.

The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and to obtain a perpetual injunction to restrain the defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the defendant had assumed a name to which the plaintiff had the exclusive right, and that that assumption would enable, as it had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriate to himself fees, which would otherwise have been paid to the plaintiff.

Held, that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office. It was a caste question not cognizable by a Civil Court.

Held, also, that the fact that there had been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that after all the result of the assumption of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the

* Second Appcal No. 133 of 1909.

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Court were to interfere in such cases, it would be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another.

APPEAL from the decision of A. D. Brown, Assistant Judge of Dharwar, confirming the decree passed by R. G. Bhadbhade, First Class Subordinate Judge at Dharwar.

Suit to obtain a declaration that the plaintiff being the *Ayya* of the *Hiremath* at Kamalapur was alone entitled to the fees, &c, of *Hiremath* and for a perpetual injunction restraining the defendant from using the surname of *Hiremath*.

There was at first no *math* at Kamalapur. The people of the village therefore repaired to the adjoining village of Malapur and paid their respects to such *Ayyas* there as they chose. Latterly the people founded a *math* and installed a predecessor of the plaintiff as the *Ayya* of the *Hiremath*. It appeared that a second *math* was started and a predecessor of the defendant was installed as its *Ayya*.

In 1905, the plaintiff filed this suit.

The Subordinate Judge found that the subject matter of the suit could be adjudicated upon, excepting as regards the declaration about the privileges and dignities attached to the *Hiremath*. He further held that the plaintiff's claim was time-barred, and that the plaintiff was not entitled to any relief.

On appeal the lower appellate Court came to the same result, holding that the suit was maintainable in a Civil Court, that the plaintiff was not entitled to the office of *Ayya* of *Hiremath* at Kamalapur; that the claim was not in time; and that the defendant had the right to use the surname *Hiremath*.

The plaintiff appealed to the High Court.

Jayakar with *M. B. Chaubal*, for the appellant.

Branson with *D. A. Khare*, for respondents Nos. 1, 2, 4 and 5.

CHANDAVARKAR, J.:—This was a suit brought by the appellant to obtain a declaration that he was entitled to the fees and privileges appertaining to the *Hiremath* at Kamalapur by reason of his title to be called the *Ayya* of that *Hiremath*, and he asked for a perpetual injunction to restrain the defendants from using the name

"Ayya of Hiremath". The Subordinate Judge, First Class, at Dharwar, who tried the suit, raised several issues, the first of which was : "Whether the matter in dispute in this suit cannot be adjudicated upon by a Civil Court." His finding upon that point was that the subject-matter could "be adjudicated upon excepting as regards the declaration about the privileges and dignities attached to the Hiremath." He held that, so far as those privileges and dignities were concerned, the question raised was one relating to "caste" within the meaning of the Bombay Regulation II of 1827, section 21.

In the appeal Court the learned Assistant Judge disposed of the case on the following issue : "Whether the plaintiff was entitled to the office of Ayya of Hiremath at Kamalapur." His finding on the evidence, on that issue, was in the negative. He held upon the evidence that the plaintiff had not proved an exclusive right to the name claimed by him.

Before us Mr. Jayakar in support of the second appeal contends that the issue raised and decided by the Assistant Judge had not been raised in the Court of first instance ; and that the suit, having been brought by the plaintiff owing to the usurpation by the defendants of a name to which the plaintiff alleged he had an exclusive right, fell within the jurisdiction of the Court, on the well-known principle of law that an unauthorized use of the name of one person by another gives a cause of action to the former, where the use is calculated to deceive and inflict pecuniary loss.

Now, the law on the point so raised is clear. It has been laid down by the House of Lords in *Earl Cowley v. Countess Cowley*⁽¹⁾ where Lord Lindley at p. 460 says : "The law on this subject has been examined in a very instructive note from the pen of the late Mr. Waley in 3 Davidson's Conveyancing, pt. I, p. 283, 2nd Ed. The judgment of Tindal, C. J., in *Davies v. Lowndes*⁽²⁾ and of the Privy Council delivered by Lord Chelmsford in *Du Boulay v. Du Boulay*⁽³⁾ leave no doubt about it. Lord Chelmsford in *Du Boulay v. Du Boulay*⁽³⁾ stated that 'in this country we do

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(1) [1901] A. C. 450.

(2) (1835) 1 Bing. N. C. 597 at p. 618.

(3) (1869) L. R. 2 P. C. 430.

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not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger.' 'The mere assumption of a name which is the patronymic of a family by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which our law affords no redress.'"

The question, therefore, is whether any damages have been incurred or not. In examining the case from that point of view it must be remembered that, closely scrutinized, the plaint in the present case does not afford any clear indication that what was complained of was the user of a name by the defendant in a manner calculated to deceive any one. When we read the summary of the plaint as given by the Subordinate Judge, who tried the case in the first instance, it appeared to us that what the plaintiff complained of was trespass on plaintiff's property by the defendant. It appears that it was under that impression that the Subordinate Judge decided the first issue raised by him partly in favour of the plaintiff. But Mr. Jayakar has candidly admitted before us that, so far as any property is concerned, there has been no trespass by the defendants upon the plaintiff's right; that all that the plaintiff complains of is that the defendant has assumed a name to which the plaintiff has alone exclusive right; and that that assumption will enable, and has enabled, the defendant to attract to himself a large number of the plaintiff's followers and thereby appropriate to himself fees, which would have gone into his (plaintiff's) pockets. When the case is thus put, it resembles *Murari v. Suba*⁽¹⁾. It is a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honours at the hands of the members of the caste in virtue of that office. That is a caste question, not cognizable by a Civil Court. The fact that there has been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that, after all, the result of the assumption of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant, show that what the parties have been fighting for is

(1) (1882) 6 Bom. 725.

merely a question of dignity under the cover of a religious office. If we were to interfere in such cases, we should be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another. We think, therefore, that the point raised by Mr. Jayakar, namely, that the suit is for damage incurred by his client by reason of the unauthorized use by the defendant of the name, to which the plaintiff alone is entitled, does not arise upon the pleadings.

On these grounds we confirm the decree with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

PIROJSHAH BIKHAJI AND OTHERS (ORIGINAL CAVEATORS NOS. 1, 2 AND 3),
APPELLANTS, *v* PESTONJI MERWANJI (ORIGINAL APPLICANT),
RESPONDENT.*

1910.
February 22.

Probate and Administration Act (V of 1881), section 81—Indian Succession Act (X of 1865), section 250—Will—Probate—Caveator—Interest possessed by the caveator.

The provisions of section 81 of the Probate and Administration Act, 1881 (which correspond with those of section 250 of the Indian Succession Act, 1865) enact that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate, but that the person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise.

Abhinam Dass v. Gopal Dass (1) followed.

APPEAL from an order passed by E. J. Varley, District Judge of Surat.

Proceedings for probate.

This was an application by Pestonji to take out probate of a will made by one Meherwanji Bomanji.

* Appeal No. 28 of 1909.

(1) (1889) 17 Cal. 48.

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In the proceedings that followed caveats were filed by four persons of whom the appellant Pirojshah claimed a share in some of the property which the testator had disposed of claiming it as his own: and the other two claimed that certain property disposed of by the will was mortgaged by them to the testator who had treated it as his own.

The preliminary question that arose in the lower Court was whether those three persons were entitled to come in as caveators at all. The District Judge held that they were not on the following grounds:—

It appears that caveator No. 1 is mentioned in paragraph 10 of the will as having an interest in certain joint property, or rather the surplus which might remain after the defraying of certain charitable charges. The other caveators are only interested to this extent that they have litigations pending with the deceased testator.

The English practice as to caveats is regulated by Statute 20 and 21 Victoria 77 section 53 and rules thereunder framed. For obvious reasons the validity of a will can only be contravened by a limited class of persons—relations beneficiaries under the will propounded as a former will, etc.

A creditor unless he has also had letters of administration granted to him cannot dispute a will (William's Law of Executors pages 279-280).

The English Procedure as to 'Caveats' does not appear to have been in any way abrogated by anything incorporated into either the Probate and Administration or Succession Acts (Acts V of 1881 and 10 of 1865). Nor as argued by opponent's pleader does the appearance of a party claiming to be interested after entry of caveat *ipso facto* make the proceedings "contentious." Cf. sections 253 and 253A of Act X of 1865, nor is section 261 imperative until the *locus standi* of the caveator, if challenged, has been established. The caveator as mortgagor has no *locus standi*. I. L. R. Calcutta XIX, p. 48 refers to mortgagees.

I. L. R. Calcutta VI, pages 429—460 decide that an attaching creditor may oppose. The case is an old one, and the remarks of Field J. seem to go beyond the English practice. So far as the caveators are concerned, there is no interest of theirs which would in any way be prejudicially affected by the grant of Probate to an Executor, with whom the existing litigation would be carried on.

The mere fact of citations having issued under section 250 calling upon persons claiming to have an interest, does not estop the propounder of the will from challenging the interest set up by the caveator, nor make the proceedings "contentious."

The caveators appealed.

L. A. Shah, for the appellants:—The appellants have an interest enough to contest the will. The will contained recitals against the appellant's interest, which if allowed, would be evidence of title. See *Nobeen Chunder Sil v. Bhobosoonduri Dabee*⁽¹⁾. Even attaching creditors and mortgagees of the estate of a deceased person, are held to have interest to oppose a will: See *Kishen Dai v. Satyendra Nath Dutt*⁽²⁾; *Kashi Chundra Deb v. Gopi Krishna Deb*⁽³⁾.

N. K. Mehta, for the respondent:—A person who is entitled to oppose the grant of probate to a will must derive his interest from the testator and not have a right against him. See *Abhiram Dass v. Gopal Dass*⁽⁴⁾.

Further in proceedings for grant of probate, Courts cannot go into questions of title: *Ochavaram Nanabhaji v. Dolatram Jamietram*⁽⁵⁾. See also *Rahamtullah Sahib v. Rama Rau*⁽⁶⁾.

In the cases relied upon by the appellants, the caveators had no interests adverse to the testator.

Shah was heard in reply.

CHANDAVARKAR, J.:—We think the case falls within the principle of *Abhiram Dass v. Gopal Dass*⁽⁴⁾. The provisions of section 250 of the Indian Succession Act, X of 1865, and section 81 of the Probate and Administration Act, V of 1881, are that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is to say, there should be no dispute whatever as to the title of the deceased to the estate, but the person who wishes to come in as caveator must show some interest in that estate derived from the deceased by inheritance or otherwise. That is the construction which the Calcutta High Court has put upon the section in the case above referred to, and that seems to be in accordance with the language of the section itself. In the present case caveator No. 1 claims adversely to the alleged testator. Ac-

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(1) (1880) 6 Cal. 460.

(2) (1901) 28 Cal. 441.

(3) (1891) 19 Cal. 48.

(4) (1889) 17 Cal. 48.

(5) (1904) 28 Bom. 644.

(6) (1894) 17 Mad. 373.

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According to the latter, the caveator has no interest whatever in the property. But according to caveator No. 1, he and the alleged testator were sharers in the properties concerned. Therefore, to the extent of the share which this caveator alleges he has in the properties, he claims adversely to the testator. So also as regards caveators Nos. 2 and 3, the alleged testator claims complete ownership of the property by reason of a sale to him, whereas the caveators in question claim the properties as their own mortgaged to the testator. Therefore, that is an adverse interest claimed by them.

We confirm the order with costs.

Order confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

DATTAMBHAT RAMBHAT JOSHI (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNABHAT BIN GOVINDBHAT JOSHI AND SIX OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), section 67—Usufructuary mortgage—Debt payable within a fixed period—Expiry of the period—Mortgagee's right to an order for sale.

Where under a usufructuary mortgage the mortgage debt is made payable within a fixed period, the mortgage is not purely a usufructuary mortgage and the mortgagee has, in the absence of a contract to the contrary, the right to an order under section 67 of the Transfer of Property Act (IV of 1882) that the property be sold after the debt has become payable.

Mahadaji v. Joti(1) and *Krishna v. Hari*(2), explained.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum with appellate powers, confirming the decree of S. S. Phadnis, Second Class Subordinate Judge of Chikodi.

* Second Appeal No. 425 of 1909.

(1) (1892) 17 Bom. 425.

(2) (1908) 10 Bom. L. R. 615.

The plaintiff sued to recover possession of the property in dispute or to recover the mortgage debt by its sale under the following circumstances:—The property belonged to the father of defendants 1 and 2 and grandfather of defendant 3. He mortgaged it to the plaintiff's father on the 29th October 1893. The mortgage-deed provided as follows:—

I have taken from you (a loan of) Rs. 300 (in words) three hundred of the Government coinage in cash for my private purposes. It is agreed that interest upon this should be at the rate of 12 (in words) twelve annas per cent. per mensem. As regards the period (of repayment) of this, I shall repay your money in two years from to-day. For this (amount) the following is mortgaged, namely, land *khata* whereof is in my name and which is situated in Mouze Nipani of Taluka Chikodi in Belgaum District, and land situated in Mouze Gavan, the *khata* whereof is in the name of Vasudevbbhat Balambhat, being lands held as Inam on account of *Joshipan*. The details of the same are as given below:—

* * * * *

The lands thus described have been mortgaged to you and given into your possession. Accordingly, you are to cultivate (or lease out) the said four lands and enjoy them in lieu of interest. And you are to write off the profits that may be yielded, in the interest, and appropriate the same. I shall, on my personal responsibility, pay whatever balance of interest may remain. You are to pay me the surplus of profits of land, if any, remaining after the interest is paid off. Immediately after the expiry of the agreement, I shall, on the *prati-pada* (the first day) of the cyclical year, pay off the whole of your money and redeem the land, at the same time. I shall not interfere with the land within that time. I have received the said rupees in cash and given this mortgage-deed in writing duly and of my own free will. Dated the 29th of October, 1893.

On the 15th March 1907 the plaintiff brought the present suit alleging that possession of the property marked A in the plaint was made over to the mortgagee and the right of collecting rent with respect to the property marked B was also made over, that in this manner the mortgagee remained in possession of the mortgaged property till the end of the cultivating season in the year 1896-97, when he was forcibly dispossessed by the defendants and that since then they had been wrongfully in possession. Hence the present suit for the recovery of possession or of the mortgage debt by sale of the property. Defendants 4—6 were joined because they were puisne-mortgagees under defendants 1—3.

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Defendants 1—3 contended that the mortgage sued on was a hollow transaction, that neither the plaintiff nor his father ever had possession of the land, that they mortgaged the property to the family of defendant 4 and that the claim was time-barred.

Defendants 4—5 set up the mortgage to them.

The Subordinate Judge found that the plaintiff could not recover possession of the property as the suit was not brought within twelve years of the mortgage, that he was not entitled to sell the property, the mortgage being usufructuary, and that the remedy for a personal decree against the defendant was time-barred as the suit was not brought within six years from October 1895 when the cause of action arose. The suit was, therefore, dismissed.

On appeal by the plaintiff the Appellate Judge framed two issues, namely, “(1) Whether the claim of plaintiff for the possession of the land is in time? and (2) Whether he can realize his money by sale of the mortgaged property?”

The findings in appeal on both the said issues were in the negative and the decree was confirmed. In the course of his judgment the Appellate Judge observed as follows:—

As regards the 1st issue, the mortgage-deed was executed on 29th October 1893, and the suit was brought more than 12 years after that date. Plaintiff alleged, however, that his father had possession of the property till 1896-97. The lower Court has carefully reviewed the evidence on the question of possession and has come to the conclusion that the mortgagee did not as a matter of fact obtain possession of the property.

* * * * *

On the whole I agree with the conclusion arrived at by the lower Court and hold that the claim for possession not having been brought within 12 years from date of mortgage is barred by limitation.

As regards the 2nd issue, the question is whether the mortgage is simply a usufructuary mortgage. There are two contrary decisions of the Bombay High Court on the point. According to the ruling at 17 Bombay, page 425, the mortgagee would have the right to recover his money by sale of the property. In the later ruling (10 Bombay Law Reporter, page 615) a contrary decision has been arrived at. The lower Court has followed the later decision in preference to the earlier one, and I think that that is the only course open to Subordinate Courts until the point be again raised in the High Court. As the mortgage is only a usufructuary one, the mortgagee cannot recover his money by sale of the mortgaged property.

The plaintiff preferred a second appeal.

H. G. Kulkarni for the appellant (plaintiff):—The mortgage-deed in suit clearly contains a covenant to pay the mortgage debt within two years. Thus the transaction is not purely a usufructuary mortgage. It is a usufructuary mortgage and there being no condition to the contrary, the mortgagee is entitled to recover the amount by sale of the mortgaged property: *Mahadaji v. Joti*⁽¹⁾. In *Krishna v. Hari*⁽²⁾ there was no express covenant to pay the debt, therefore, that decision cannot govern the present case. The Madras High Court has in the Full Bench ruling in *Sivakami Ammal v. Gopala Sarundram Ayyan*⁽³⁾ taken a similar view about the right of the mortgagee to bring the mortgaged property to sale. The Bombay High Court also has taken the same view in *Parasharam v. Putlajirao*⁽⁴⁾.

N. A. Shiveshwarikar for respondents 1—3 (defendants 1—3):—The transaction is purely a usufructuary mortgage and that being so, under the terms of section 67 of the Transfer of Property Act a usufructuary mortgagee as such, unless there is anything in the contract which would imply a right, cannot sue either for foreclosure or sale: *Luchmeshar Singh v. Dookh Mochan Jha*⁽⁵⁾.

The mortgage transaction in *Parasharam v. Putlajirao*⁽⁴⁾ was governed by section XV clause (3) of Regulation V of 1827. The mortgage transaction in dispute was effected in 1893. Therefore it is governed by the provisions of the Transfer of Property Act.

In *Krishna v. Hari*⁽⁶⁾ it was held that a mere covenant to pay, unaccompanied by the hypothecation of the property, cannot alter the character of the mortgage and give the mortgagee a right to sell in the event of non-payment.

SCOTT, C. J.:—The question in this case is whether the appellant has a right to an order for sale of mortgaged property the subject of the mortgage-deed of the 29th October 1893.

The learned Judge of the lower Court has considered that there are two contrary decisions of this Court upon the point

(1) (1892) 17 Bom. 425.

(2) (1908) 10 Bom. L. R. 615.

(3) (1891) 17 Mad. 131.

(4) See *ante* p. 128.

(5) (1897) 24 Cal. 677.

(6) (1908) 10 Bom. L. R. 615.

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and that he was bound to follow the later ruling, and he has accordingly followed what he believed to be the effect of the judgment in *Krishna v. Hari*⁽¹⁾ in preference to one in *Mahadaji v. Joti*⁽²⁾. In giving this preference to the judgment in *Krishna v. Hari*⁽¹⁾ he has lost sight of the provisions of section 3 of the Indian Law Reports Act XVIII of 1875.

We think, however, that he has misread the judgment in *Krishna v. Hari*⁽¹⁾, which was shown by the judgment of this Court in *Parasharam v. Putlajirao*⁽³⁾, to fall within a different class of cases to that in *Mahadaji v. Joti*⁽²⁾. In the last mentioned case, there was a distinct covenant to pay after five years from the date of the bond. In *Krishna v. Hari*⁽¹⁾ there was no covenant to pay the principal amount at any particular date. In the mortgage which we now have under consideration the mortgagor covenants "as regards the period of repayment of this, I shall repay your money in two years from to-day. For this amount the security is the land described below." It is, therefore, not a case of a purely usufructuary mortgage, but a case in which the mortgage-money has become payable by the mortgagor and therefore in the absence of a contract to the contrary the mortgagee has the right under section 67 of the Transfer of Property Act to an order that the property be sold.

We therefore reverse the decree of the lower Court and pass a decree for the plaintiff ordering that in default of the defendant paying the amount of principal and interest not exceeding *damdupat* within six months from this date, the property be sold and the proceeds of the sale paid into Court and applied in payment of what is found due to the plaintiff and that the balance if any be paid to the defendants or other persons entitled to receive the same.

The plaintiff will be entitled to add his costs of this suit to the mortgage debt.

Decree reversed.

G. B. R.

(1) (1908) 10 Bom. L. R. 615.

(2) (1892) 17 Bom. 425.

(3) See *ante* p. 128.

ORIGINAL CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Macleod.

JETHABHAI NARSEY, APPELLANT AND DEFENDANT, *v.* CHAPSEY
COOVERJI, RESPONDENT AND PLAINTIFF.*

1909.

August 12.

Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste questions—Application of Indian Trusts Act (II of 1889), sections 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), section 151.

As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan.

Held that as trustee of the Detasar and Sadhvan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed.

Bank of Bombay v. Suleman⁽¹⁾ referred to.

Held, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance.

Held, further, on the evidence, that there had been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed.

Held, further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste.

The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savurichand*⁽²⁾. *Lalji Shamji v. Walji Wardkhan*⁽³⁾ referred to and distinguished.

* Original Suit No. 687 of 1905, Appeal No. 1480.

(1) (1908) 32 Bom. 466 at p. 474.

(2) (1880) 5 Bom. at p. 81 F. N.

(3) (1895) 19 Bom. 507.

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Held, lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908).

THIS was a suit filed by the plaintiff for a declaration that he had the right to inspect and take copies of all books of account, minute-books and documents of the Mahajan, Managing Committee, Sub-Committee, and Trustees of the Cutchi Dassa Oswal caste, and for an injunction restraining the defendant from interfering with him in the exercise of that right. Both the parties were trustees of the Derasar and the Sadharan funds of the caste and both were similarly members of the Managing Committee, the defendant being President of that body.

The plaintiff alleged that complaints had been made to him that certain of the caste funds had been misapplied and irregular resolutions passed by the Managing Committee, and it was with a view of investigating these complaints that he claimed the inspection. While admitting that his right to inspection as a member of the caste was subject to the permission of the President or Secretary of the Managing Committee, he asserted that, under the caste rules, as a trustee he had an absolute right.

The defendant denied the plaintiff's right, and contended further (*inter alia*) that the question was purely a caste question, and not one which the Court could entertain.

The case came before Mr. Justice Chandavarkar, who gave judgment for the plaintiff with costs.

The defendant appealed.

Strangman (Advocate-General) with *Joshi* and *Taraporewalla* for the appellant :—

In the first place, the plaintiff in his capacity as member of the caste or as member of the Managing Committee has neither at common law, nor under the caste rules, any such right as alleged. See *Bank of Bombay v. Suleman*⁽¹⁾. As trustee he bases his claim both on the common law and on the caste rules.

(1) (1908) 32 Bom. 466.

His trusteeship of the Derasar and Sadharan funds, however—and these are the only funds of which he is a trustee—cannot improve his position, as the documents in question (the minutes of the Sub-Committee and the correspondence file of the Mahajan) do not in any way appertain to these funds. Rule 8 of the caste rules, on which he relies, excepts trustees from the general prohibition only in respect of the particular documents relating to their trusts.

In the second place, even assuming that the plaintiff has such a right, has it ever been denied him by the defendant? The correspondence shows this was not so. On this point see Taylor on evidence, Article 1502.

Finally, assuming all the above points in the plaintiff's favour, he has no cause of action in a Court of law. It is a caste question entirely and he must go to the caste for relief. No right of property is involved. A decree of this Court based on a caste rule would be worth nothing, inasmuch as the caste could at once render it nugatory. *Murari v. Suba*⁽¹⁾, *Pragji Kalan v. Govind Gopal*⁽²⁾, *Raghunath Damodhar v. Janardhan Gopal*⁽³⁾, *Lalji Shamji v. Walji Wardhman*⁽⁴⁾.

Padshah with *Jinnah* for the respondent :—

The defendant was also a trustee of the Mahajan fund. The resolution of 19th January 1905 appointed him trustee, and he wrote accepting the office on 3rd February. As trustee of this fund he certainly had the right of inspection claimed.

In *Bank of Bombay v. Suleman*⁽⁵⁾ the plaintiff had no special interest as the plaintiff has here, as a trustee and member of the Managing Committee. This is not a caste question, but the invasion of the right of a trustee, non-exercise of which would put him to damages which cannot be assessed.

The plaintiff's right was certainly denied by the defendant, who was one of several joint tort-feasors. Action by the Court in the matter would not interfere with the autonomy of the caste.

(1) (1882) 6 Bom. 725.

(2) (1887) 11 Bom. 534.

(3) (1891) 15 Bom., p. 610.

(4) (1895) 19 Bom. 507.

(5) (1908) 32 Bom. 466.

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Strangman in reply :—

The plaintiff was not a trustee of the Mahajan fund. No trust-deed was executed, although the resolution of 19th January 1905, on which he relies, clearly intended a deed to be executed. This fund was definitely held to be a secular fund in *Thackersey v. Hulbhumi*⁽¹⁾, and as such comes under the Indian Trusts Act. Sections 5 and 6 of that Act require a written instrument and a transfer of the property for the trust to be valid. The plaintiff thus cannot claim to be a trustee of this fund merely by reason of the resolution and his letter of acceptance. Further, he never demanded inspection as a trustee of the Mahajan fund. Nor did he put forward this claim in the Court below.

Cur. adv. vult.

BATCHELOR, J.—This rather heavy litigation was the unfortunate result of a division or faction in the Cutchi Dassa Oswal caste, to which both the parties belong. At the time of the suit the defendant was President and the plaintiff was a member of the Managing Committee of the caste while both the plaintiff and defendant were trustees of two trust funds established by the caste, under separate trust deeds, called the Derasar and Sadharan funds.

The plaintiff sued for a declaration that he was entitled to inspect and take copies of all the books and documents of the Mahajan, the Managing Committee, the Sub-Committee and the Trustees; and for an injunction restraining the defendant from interfering with the plaintiff's exercise of his rights in this regard. The defendant's main answers to the suit were that the question in dispute was a purely caste question outside the jurisdiction of the Court; that the plaintiff was not entitled to inspect the minute books of the Sub-Committee or the correspondence file; and that no cause of action had arisen against the defendant who had never refused or denied the plaintiff's right to take inspection of such documents as he had a valid claim to see.

The learned judge below found that the suit was properly cognizable by the Court; that the plaintiff had a right to free inspection of all the books and documents of the caste; and that the defendant had on the 7th September 1905 denied the plaintiff's right. He, therefore, made a decree declaring that the plaintiff was entitled to inspect and take copies of all or any of the books, and restraining the defendant from interfering with the plaintiff's exercise of his right.

From that decree, the defendant now appeals, and the learned Advocate-General on his behalf has addressed to us a three-fold argument. He contends, first, that the plaintiff has no right to inspect the minute books of the Sub-Committee or the correspondence file, these being the two documents about which alone there is any controversy; secondly, that, if such a right exists in the plaintiff, it was never denied by the defendant; and, thirdly, that in any event the question between the parties is a purely caste question involving no rights to property, and is not within the Court's jurisdiction.

Mr. Padshah for the respondent-plaintiff seems to have felt some difficulty in supporting the decree on the grounds assigned in the learned Judge's judgment, and has accordingly directed the main stress of his argument towards establishing that his client was a trustee not only of the above-mentioned Derasar and Sadharan funds but also generally of the whole Mahajan property. If that is so, it is argued that his capacity as a trustee of the whole caste property would give him a valid claim to inspect all the books and documents of the caste. Bearing in mind the character of the two documents now in dispute, we seriously doubt whether even on this hypothesis they would be necessarily exposed to the plaintiff's inspection; but this point need not be decided because we think that the plaintiff's claim to be a trustee of the whole Mahajan property must be disallowed. It is sufficiently answered, in the first place, by the fact that there was never any demand made by the plaintiff for inspection on this footing. Upon this point the most important evidence is Exhibit K, the correspondence immediately preceding the institution of the suit, and if reference be made to this correspondence, particularly to the plaintiff's solicitor's letter of 15th

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August 1905, it will be seen that plaintiff's demand was grounded upon his being a member of the Managing Committee and a trustee of the Derasar and Sadharan funds. So, in the suit which the plaintiff has subsequently filed to set aside the order of the caste purporting to dismiss him from his trusteeship, the only trusteeship alleged is that of these two funds. It appears, indeed that the now alleged trusteeship of the whole Mahajan property is a new point, which was not taken before the trying Judge. It is true that in the first para of the plaint it is stated that "the plaintiff and defendant are both trustees of the property of the caste," but we think that these somewhat general words must be read as mere description, not specifically raising any title beyond that arising from the trusteeship of the separate funds. This view receives support from the voluminous record, which may be searched in vain for any such distinction as is now sought to be drawn. From that record it appears to us indisputable that, in the Court below, the suit was tried out upon the understanding between the parties that the only trusteeship relied on by the plaintiff was that of the two separate funds. It was at first denied for the defendant that the plaintiff was even a trustee of those funds, the contention being that he had been dismissed by the caste; later, however, this contention was abandoned as the alleged dismissal was subsequent to the date of suit. It was therefore, formally admitted by counsel for the defendant that "the plaintiff was a trustee". But it is, we think, quite certain that counsel for the defendant could never have admitted the plaintiff's claim to be a trustee of the whole caste property.

Then, admitting for the sake of the argument that the point is now open to the plaintiff, has he shown that at date of suit he was a trustee of the whole caste property? To make good the position he relies on Exhibit D, the caste resolution of the 19th January 1905, and Exhibit U, the plaintiff's acceptance of that resolution on 3rd February 1905. Exhibit D is the record of a successful motion at a meeting of the Mahajan that the plaintiff and other members named "be appointed (or named) and they are to get the properties of" the Mahajan transferred to their names, and that, getting a trust-deed of the Mahajan fund prepared they are to take "charge of the management of the

Mahajan". In Exhibit U, the plaintiff acknowledges that he has been "selected", and accepts, or agrees to, the action of the caste. We are, however, of opinion that these two Exhibits do not suffice to constitute the plaintiff a trustee of the Mahajan property. Admittedly this was not a case of a new appointment to an existing trust, for no trust of the Mahajan property had ever before been created and that property was then vested in the caste, on whose behalf the powers of management were delegated to the Managing Committee under rules 1 and 2 of the caste rules, Exhibit J. Now Exhibit D clearly contemplates that, to carry into effect the announced intention of creating a trust, a trust deed should be prepared divesting the caste and vesting the property in the persons chosen to be trustees. No such deed has ever been executed or even prepared, and the legal title to the property still remains with the caste. This fact becomes the more significant when contrasted with the other fact that in regard to the Derasar and Sadharan funds regular deeds of trust were prepared and executed: see Exhibits A and B. In these circumstances it appears to us that the intention to create a trust of the Mahajan fund remained uneffected. Upon this point reference may be made to sections 5 and 6 of the Indian Trusts Act, which require for the creation of a valid trust an instrument in writing and a transfer of the property. It is true that the Trusts Act does not apply to public or private religious or charitable endowments; but it has already been held by this Court in *Thackersey Dewraj v. Humblum Nursey*⁽¹⁾ that the Mahajan fund of this caste is a purely secular fund, and we think that the principles of sections 5 and 6 of the Act are properly applicable. Upon these grounds we come to the conclusion that no trust of the Mahajan fund was created, and that the plaintiff cannot claim to have been a trustee of the whole caste property.

If that is so, then the question is narrowed down to the form which alone we understand it to have assumed in the lower Court, that is to say, the question whether the plaintiff is entitled to claim this inspection

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(1) (1883) 8 Bom. 432.

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(a) in his character as a trustee of the Derasar and Sadharan funds, or

(b) in his character as a member of the Managing Committee, or

(c) in his character as a member of the caste.

Now as to the plaintiff's capacities under heads (b) and (c) Mr. Padshah, whose forcible and exhaustive argument has omitted nothing capable of telling in his client's favour, has candidly admitted that the plaintiff's privileges in regard to inspection must be determined solely by reference to the rules of the caste, and that these rules—see rule 8—formally exclude the right of inspection. The caste having made a rule in regard to inspection no other line of argument was possible, but even if the rules of the caste had been silent on the question of inspection, we do not think that a right to inspection existing in any person by virtue of his being a member of the caste or of its Managing Committee could be evolved by a reference to English law. That unique aggregation, the Hindu caste, is so wholly unknown to the English law that, as it seems to us, English decisions concerning English corporations and partnerships tend rather to confusion than to guidance upon such a question as that now in hand. A Hindu caste may have points of resemblance to English corporations and partnerships, but its points of difference appear to us even more numerous and more radical. We have, therefore, had no hesitation in accepting Mr. Padshah's admission upon this part of the case, though when we come later to the question of the caste's autonomy we shall have occasion to adduce further reasons in support of our view.

If we are right so far, then, the result is that the plaintiff can make no claim to this inspection except as a trustee of the particular funds known as Derasar and Sadharan. We propose in discussing the whole question to follow the order of the Advocate General's argument, to inquire, that is to say, first, whether plaintiff had any such right; secondly, whether, if so, it was definitely demanded by the plaintiff and was denied by the defendant; and, thirdly, whether in any case the question is not a caste question beyond the Court's jurisdiction.

Upon the first of these questions it is plain that, as trustee of the two funds, the plaintiff has certain legal rights apart altogether from any privileges which he may have under the regulations of the caste ; for though it is competent to a caste to appoint a man a trustee or not to appoint him, it cannot, having once so appointed him, restrict the legal rights incidental to his position as trustee. We must, therefore, examine separately the plaintiff's legal rights as trustee and his caste rights, for it is enough for him to succeed upon either.

His legal rights as trustee of the Derasar and Sadharan funds cannot, in our opinion, entitle him to inspection of the two contested documents which do not appertain to either of these trusts. This, as we understood his argument, was not seriously contested by Mr. Padshah, who upon this point relied on the larger contention that the plaintiff was a trustee of the whole caste property ; and it would seem that the distinction and its consequences were not prominently brought before the learned Judge below. The documents of which inspection is claimed are, as we have said, the Sub-Committee's minute book and the correspondence file of the Mahajan. The Sub-Committee's minute book contains the record of what is called the Judicial Branch of the caste, that is, of the inquiries made by the Sub-Committee into caste offences alleged to have been committed by various members. The correspondence file contains the letters written and received by the Managing Committee on behalf of the whole caste. These documents in no sense belong to the Derasar or Sadharan trusts, which have separate books of their own, and there is no allegation that these books have been incorrectly kept. As trustee of these two funds only, the plaintiff could, we think, have no legal claim to a roving inspection of all caste documents on the ground that some of such documents may possibly be found to contain entries bearing upon questions of expenditure having some connection with the trusts, and no such power is implied in the deeds creating the trusts, Exhibits A and B.

This part of the case need not, however, be further pursued because we were not pressed to allow the plaintiff's claim on the footing of his legal rights as a trustee of the Derasar and Sadharan

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funds only. The plaintiff in the Court below and his counsel before us have preferred to rely upon the plaintiff's privileges as a trustee by virtue of the rules of the caste, and the argument is that, though the trusteeship would not suffice to found a valid claim in law, it does suffice to found a good claim under No. 8 of the caste rules to be found under the heading "Secretary." This rule is in the following words:—

"Without the permission of the Secretary or the President no person or persons whatever except the trustees can inspect any book or document whatever, nor can he or they remove it even outside the office."

This is the official translation from the Gujarati. We have referred to the original, but it throws no further light on the meaning of the rule as to the position of trustees. At the time the rule was made the only trustees in existence were the trustees of the Derasar and Sadharan funds, though there are indications that the caste even then contemplated appointing the same persons to a trust to be created of the whole Mahajan property. The question is, what rights to inspection are conferred upon the trustees by the rule cited. The learned Judge below has read the rule as meaning that the trustees are authorised to inspect all caste documents whatsoever, but, though we have hesitated before differing from his opinion, we are constrained to regard a narrower interpretation as more consistent with the actual words, and with the probable intention of the framers of the rules. It appears to us that the rule enacts a general and sweeping exclusion, from which the trustees are excepted, that is, it is not true to say of the trustees that they are excluded from inspecting all documents whatsoever. But it does not seem to be implied that they are entitled to inspect all documents whatsoever, but rather that they are entitled to inspect some documents (undefined), and in that case the documents referred to would be those belonging to their trusts. In other words, the rule, as we construe it, first prohibits all inspection by any members without permission, and then saves the legal rights of trustees as such. This interpretation seems to us to be the more reasonable when regard is had to the extreme frequency of factional divisions in Hindu castes, and to the ease

with which rights of inspection can be exercised for purposes of dissension and litigation. This particular caste has, as the reports show, been more than once involved in litigation owing to these intestine feuds. We think it more likely therefore that the caste should have narrowly limited these rights of inspection than that it should have lavished them without check on the trustees of the two special funds. We may add that if the broader construction of the rule were to be preferred on the sole ground which appears tenable, namely, the theory that the caste intended to have the existing trustees appointed to a new trust of all caste property then the plaintiff's case would not, in our opinion, be advanced, for upon that supposition he would be seeking to take advantage of an intention or design which the caste never carried into effect. Finally, upon this branch of the case, we think that the actual result will not depend upon the precise construction of rule No. 8. For, let us suppose that the rule does confer upon the trustees—that is, the trustees of the two funds, who alone existed—an unfettered right of inspection of all caste documents; that, as we have shown, would be a mere caste privilege altogether in excess of any claim which the trusteeship of the two funds would legally justify. But what the caste gave yesterday, they could withdraw tomorrow and no decree could be based on a caste privilege of this kind inasmuch as the caste could at once render it nugatory. Nor is this an unreal apprehension, on the contrary, in view of the trustees' action on the 10th September (see Exhibit 36) and the other evidence brought to our notice, it appears to us very probable that the majority of the caste would, as they could, override any decree made in the plaintiff's favour.

This completes our observations on the first question as to the plaintiff's right to claim inspection of these documents, and, for the reasons given, we must hold that the plaintiff had no such right either at law or under the rules of the caste.

For the next question we must assume that that view is wrong and proceed to inquire whether the plaintiff's right was ever denied by the defendant so as to give to the plaintiff a good cause of action. What is required to found a suit of this character is stated, we think correctly, in the following

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terms in Taylor's Evidence, Article 1502 "It must be established that an express demand was addressed to the proper quarter and was distinctly refused, or, at least, that the other party showed by his conduct that he was determined not to do what was required." Let us see whether these conditions are satisfied here. First, what was the proper quarter? According to the plaintiff's case, as stated in para 2 of his plaint, the proper and actual custodians of these books were the trustees, and the learned Judge below, for reasons which have not been canvassed before us, held that that case was proved. We are of the same opinion. But the defendant is only one of the trustees, and there is the less reason for allowing the plaintiff to sue him alone inasmuch as he was not present at the meeting of the 10th September, where, for the first time, we meet with a plain refusal to give inspection. As we understand the matter, it is not a case of selecting at will any one of joint tort-feasors. The demand for inspection was not made in the proper quarter, and the defendant cannot alone be held answerable for a resolution of the other trustees at a meeting which he did not attend.

Then assuming there was a demand made to the defendant at the proper quarter, was there such a refusal or denial by the defendant as would justify this suit? We think not. Here we must look a little closely at the facts preceding the institution of this suit, and must bear in mind the obvious consideration that dilatoriness and excuses for inaction are not, at least in India, to be regarded as necessarily equivalent to denial of right. The all important evidence is, in our opinion, the correspondence Exhibit K from 16th August to 11th September 1905. That correspondence discloses to us the plaintiff watching for a favourable opportunity to launch his suit, and on the 1st September his solicitors declare that the plaint is already in draft. It was declared on the 12th September, having on the previous day been sent to counsel for formal settlement. Now para 4 of the plaint, which alleges the refusal of the right, is significantly reticent as to the date when the refusal occurred, and it appears that this allegation was already made when the plaint was put in draft. But the only events on which the plea of refusal is sought to be grounded are those which occurred on the 7th September, if we except a certain faint suggestion

that events of the 8th to 10th may also be prayed in aid. It seems to us clear that these later events cannot be used to support the case against the defendant who was away in Poona when they occurred, and who, as already stated, did not attend the trustees' meeting of the 10th. It is true, as the learned Judge says, that the resolution of the 10th was a denial of the plaintiff's right, but that was a resolution by other trustees, not parties, and the defendant took no part in it. Now if we refer to the correspondence, Exhibit K, we shall see that it is this resolution of the general body of trustees (without the defendant) which alone is referred to as constituting a denial of the plaintiff's right. That follows from the plaintiff's attorneys' letter of the 11th September where we first meet a plain allegation of a refusal, that is, the refusal by the other trustees on the 10th. But the latest letter which can be used against the defendant, owing to his subsequent absence from Bombay, is that from the plaintiff's attorneys, dated the 8th September, referring to the events of the 7th. This letter, however, does not even allege a refusal, despite the plaintiff's then anxiety to make a case; it alleges only "frivolous objections" to conceding the demand and a "pretext" that a certain necessary key was with the Mehta; but even the "pretext" is not apparently disbelieved, for, the plaintiff says that he objects to the key remaining with the Mehta. Even as late as the 11th September we find the plaintiff saying, through his solicitors, that *unless* the defendant takes a certain course he will conclude that the defendant "objects to the inspection." We must infer from all this that nothing that happened on the 7th September was understood even by the plaintiff himself to amount to a denial or refusal, and in view of the plaintiff's position, to which we have alluded, it is certain that he did not understate his own case. If further assurance were needed, it would be found in the plaintiff's own deposition, where he says in examination-in-chief: "I attended on the 7 h September to take inspection and copies. Inspection of the Mahajan book was allowed, but as to the correspondence file I was told it could not be found"; and he goes on to confirm the facts as stated in his solicitors' letter of the 8th September. It is true that, after the lapse of a considerable interval, which enabled him to reconsider his evidence, the plaintiff in cross-examination seized an opportunity to endea-

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your to improve his story, but in all the circumstances we can attach no importance to this attempt. Thus the occurrences of the 7th September, which are wholly, or almost wholly, relied on to support this suit, fail in their purpose because it is manifest that the plaintiff himself never understood them to amount to a denial of his right. For the events between the 7th September and the filing of the suit the defendant was not responsible, they were the acts of the other trustees in the defendant's absence. As to Exhibit M, the record of the trustees' meeting of the 2nd September, we read that as a plain indication that defendant made no refusal, but that the plaintiff was actively endeavouring to discover or to make an excuse for litigation.

Again, the right claimed was an unqualified right to hand over all the caste books for the years 1903, 1904 and 1905. But the plaintiff never became a trustee of the two funds till he signed the two trust deeds, exhibits A & B, on the 7th September 1905, and in any case his claim to inspect earlier documents would have been inadmissible. Therefore, though we hold there was no denial, it would be difficult to say that a denial of an excessive claim would have been unwarrantable. In this context it is relevant to observe that, when pressed as to the purposes for which he wanted inspection, the plaintiff said. "At first I merely wanted to look into the minutes of the Sub-Committee. That was for no particular purpose. I must look into a thing first before I can say why I want to look into it." We read this as meaning that, as the evidence generally suggests, the plaintiff's real object was to make a fishing inquiry in the hope of finding some materials wherewith further to embarrass the majority of the caste. If that is so, reference may usefully be made to the observations of their Lordships of the Judicial Committee in the *Bank of Bombay v. Suleman*⁽¹⁾

There now remains the single point, whether this is a caste question and so beyond the jurisdiction of the Court. That, of course, must be discussed on the assumption that our foregoing findings are wrong. In our opinion this point also must be determined in the defendant's favour. As we have tried to show

in an earlier part of this judgment, the plaintiff's claim cannot be supported by reference to his legal rights as trustee of the two funds. If he is to succeed at all, the plaintiff must succeed, as indeed he himself puts his case, under the rules of the caste, so that the question comes down to this, is the plaintiff by reason of his holding a certain caste office, entitled under the caste rules to inspection of all caste documents? It appears to us that that is eminently a question for the caste, and not for the Court.

Upon this subject we must notice that there is visible a growing tendency to endeavour to enlarge the jurisdiction of the Courts beyond the limits set by existing authorities, but in our judgment the tendency ought not to be encouraged. The records of our Courts show that a Hindu, whose own preferences or inclinations do not commend themselves to his caste, is apt to try and use the civil Court as a means whereby his wishes may be forced on the majority, and we are of opinion that this suit is an illustration of the practice. Mr. Padshah admitted that the authorities of the caste would, as he phrased it, have "concurrent jurisdiction" with the civil Court to determine the question now in issue; and that appears to us to be a dangerous admission. For, though the decisions are not perhaps altogether harmonious, there is no doubt that their general weight favours the test which received the high authority of Sargent C. J. in *Munari v. Suba* ⁽¹⁾ and was followed by Fairan J. in *Lalji Shamji v. Walji Wardhman* ⁽²⁾. That test is, "Would the taking cognizance of the matter in dispute be an interference with the autonomy of the caste?" Now autonomy is rather a large word, and, without attempting to define it, we think it must mean at least as much as this, that where rights to property are not involved all matters of internal management must be left to the decision of the caste. This proposition has the support of several cases which we do not cite as the proposition itself was not challenged before us. No rights to property are involved here, yet the Court's interference is sought on a question for which the rules of the caste make provision. If we are to take the decision out of the hands of the caste, it is difficult to see either what would be left of the caste's autonomy or where the

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(1) (1892) 6 Bom, 725.

(2) (1894) 19 Bom. 507.

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process is to stop ; yet it is on many grounds very undesirable that the Courts should assume the jurisdiction, or be burdened with the duty, of deciding the numberless small points of religious or social usage and etiquette which form the common subjects of difference. In *Murari's case* there was a claim to property, *viz.*, to the fees appurtenant to a caste office, yet Sir Charles Sargent held that, the office being a caste office, the Court was not vested with jurisdiction by reason of the annexed fees. That decision was, no doubt, under the Regulation of 1827 which does not govern suits on the Original Side of this Court, but it has not been argued that the practice on the Original Side under section 9 of the Civil Procedure Code of 1908 differs from the course prescribed by the Regulation, and we can see no reason whatever why the rules as to the admissibility of caste suits should be one thing for the mufassal and another thing for the presidency town. The plaintiff relies on Farran J.'s decision in *Lalji's case*, which was a case among members of the caste now before us, but, if the facts there be examined, we do not think that the decision assists the plaintiff. Upon reading the whole judgment attentively, we think that Farran, J. felt that he was going as near the limit of interference as was possible but it is not necessary for us to consider the correctness of his decision as we find that it is easily distinguishable from the present case. For, in *Lalji's case* a question of property was involved, *viz.*, the right to the use of the caste oart, and the learned Judge was satisfied that his decree would give effect to the wishes of the majority. Those, as we read the report, were the principal *rationes decidendi*, and both of them are absent here. Here, as the learned Judge below points out, the suit is not in form a suit against the caste, but even in form it is a suit to enforce a caste privilege and for that redress the proper tribunal to approach is the caste whose rule is said to have been infringed, and not the civil Court. The real character of the suit, however, is we think, a claim against the present constituted authorities of the caste ; substantially it is a suit to obtain from the Court an order, which the plaintiff knows the caste would never make, as to a matter concerning the internal arrangement of the caste affairs, and this explains why the claim was brought before the Court and not before the caste,

though the caste admittedly had jurisdiction to decide it. The question in dispute is in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it is outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savaichand*⁽¹⁾ which was approved by Sargent, C. J., in *Metha Jethalal v. Jamiatram Lalubhai*⁽²⁾. *Nemchand's* case was decided by a Full Bench consisting of Sir Richard Couch, C. J., and four other Judges. The plaintiffs, who represented one of the factions into which the caste was split, claimed a declaration that they were the proper recipients of half the compensation which had been allowed by the Collector for certain shops belonging to the caste. It will be seen, therefore, that there was a distinct and specific claim to property; yet the Full Bench held that the Courts had no jurisdiction. In our opinion the plaintiffs there had a stronger case than has the plaintiff before us and if this appeal has to be decided on a comparison of the authority of the two cases, *Lalji Shamji v. Walji Wardkman*⁽³⁾ and *Nemchand v. Savaichand*⁽¹⁾ there can be no question that the authority of the latter must prevail. For, though it is competent to us not to follow the ruling of a single judge, we are concluded by a decision of the Full Bench whether we agree with it or not. But in fact for the reasons given we do entirely agree with the decision in *Nemchand v. Savaichand*⁽¹⁾ which so far as we are aware has been the law of this Presidency since 1866: compare *Gurdhar v. Kalya*⁽⁴⁾ and the already cited case of *Metha Jethalal v. Jamiatram Lalubhai*⁽⁵⁾; and in our opinion the decision in *Lalji's* case cannot be regarded as authority for extending the jurisdiction of the Court beyond the point at which it is left by the earlier cases.

Finally, as to section 151, Civil Procedure Code, that has no bearing on the present discussion for, when according to well established principles certain questions have been removed from the jurisdiction of the Court, we do not think they can be brought within the jurisdiction on the plea that the Court has inherent

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(1) (1880) 5 Bom. at p. 84 F N.

(3) (1894) 19 Bom 507

(2) (1887) 12 Bom. 225.

(4) (1880) 5 Bom p 8°.

(5) (1887) 12 Bom. 225

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jurisdiction to do what justice requires for the parties before it. That plea cannot be urged in order to extend the jurisdiction of the Court, but to meet the objection often raised that in matters within the jurisdiction the Court can only exercise such powers as are expressly given by the legislature and no others.

On the foregoing grounds, then, and with very sincere respect for the learned trying Judge and his exhaustive treatment of the suit as it was presented to him, we have felt compelled to adopt a different view as to the rights of the parties in this case.

We reverse the decree under appeal, and order that the suit be dismissed with costs throughout.

Decree reversed.

Attorneys for the appellant: Messrs. *Wadia, Gandhi & Co.*

Attorneys for the respondent: Messrs. *Matubhai, Jamietram and Madan.*

K. M. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

A. HAJI ISMAIL & Co, PLAINTIFFS, v. RABIABAI AND ANOTHER,
DEFENDANTS.*

*Practice—Dissolution of partnership—Assets in hands of receiver—
Judgment creditor—Charging order—Solicitors' lien for costs.*

The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court; and, where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership.

Ridd v. Thorne (1), followed.

Where a plaintiff has obtained a decree against a partnership firm, the available assets of which are in the hands of a receiver appointed in a previous

* Original Suit No. 523 of 1907.

(1) (1902) 2 Ch. 344.

partnership suit, his proper course is not to issue execution against those assets, but to ask the Court for a charging order, and to undertake to deal with the charge according to the order of the Court.

Kewney v. Altrill ⁽¹⁾, followed.

PROCEEDINGS in chambers on a garnishee notice. The facts appear sufficiently from the judgment.

Captain, of Messrs. *Captain and Vaidya*, for the plaintiffs.

Thakordas A. Gandhi for first defendant.

MACLEOD, J.—The two defendants in this suit were partners and in a suit No. 96 of 1907 filed by the first defendant against the second defendant for dissolution of partnership, a receiver was appointed to get in the assets. The receiver has now in his hands a sum of about Rs. 1,698 as assets and it is not considered likely that he will recover anything more.

The plaintiffs in this suit having obtained a decree against the defendants were granted leave to issue execution against the assets of the partnership in the hands of the receiver and a prohibitory order was issued on the 19th June 1908. They have now taken out a garnishee notice against the receiver to pay to the plaintiffs the money in his hands. I am told that no other claims have been made against these assets but a question arises whether they are not subject to the lien of the solicitors in the partnership suit for their costs.

The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court and the case of *Ridd v. Thorne* ⁽²⁾ is a direct authority for holding that where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership.

Apart from that the procedure adopted by the plaintiffs in this suit is, in my opinion, wrong. They should not have issued execution against the assets in the hands of the receiver. The proper course was to ask the Court for a charging order in the

(1) (1886) 34 Ch. D. 345.

(2) (1902) 2 Ch. 344.

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form granted by Kay, J., in *Kewney v. Attrill*⁽¹⁾. The assets of the partnership can then be dealt with by the Court by giving directions to the receiver and it is desirable that this procedure should be followed in future.

I discharge the prohibitory order and garnishee notice and give the plaintiffs a charge on the moneys which are in the hands of or which may be taken possession of by the receiver and they must undertake to deal with the charge according to the order of the Court. The charge will be for the judgment debt and costs and interest and the costs of this order. The lien of the solicitors for their costs in the partnership suit will take priority over this charging order.

K. MCI, K.

(1) (1886) 34 Ch. D. 315.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

1909.
 September 6.

IN THE MATTER OF LAND ACQUISITION ACT. IN THE MATTER OF GOVERNMENT AND SUKHANAND GURUMUKHRAI AND ANOTHER.*

Land Acquisition Act (I of 1894)—Compensation—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice.

The income of a property whether actual or imaginary is no doubt one of the recognised starting points for a valuation, but it is a mistake to think that it is the only element to be taken into consideration.

In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property—in the sense of property which a purchaser wishes to acquire for his own residence—is such a commodity.

The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration.

* Reference No. 40 of 1908.

It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal.

REFERENCE under s. 18 of the Land Acquisition Act.

The facts appear sufficiently from the judgment of the Court.

Robertson with Jardine for the claimants.

Weldon (Strangman, Advocate-General, with him) for Government.

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MACLEOD, J.—This is a reference by the Special Acquisition Officer under s. 18 of the Land Acquisition Act relating to a piece of land measuring 3,009 square yards with a bungalow erected thereon situated on the Matunga Road which runs between Matunga station on the G. I. P. Railway Company's line and Mahim station on the B. B. & C. I. Railway Company's line. The property was notified by Government for the purpose of being handed over to the G. I. P. Railway Company which required additional land for traffic sidings and waggon sheds. A considerable area of the surrounding land has already been the subject matter of previous references before me. The claimant purchased the land in reference about 1901 at the rate of Rs. 2 per square yard, and after filling it in all over to the extent of about 2 feet built a substantial upper storied bungalow with out-houses. The whole was surrounded with a low wall surmounted by a wooden fence. The compound has been laid out as a garden. This neighbourhood after the plague broke out in Bombay towards the end of 1896 was the first resorted to by persons who wished on that account to live outside the city. A considerable quantity of land changed hands and houses began to be built, but further development was checked when it was ascertained that the Bombay Improvement Trust had notified for acquisition all the land between the two Railways from Dadar to Matunga, so far back as 1898 or 1899. That notice was cancelled about the year 1905 and a fresh notice was issued by Government for acquisition for the Railway Company on the 22nd February 1906. The demand, however, for suburban residences continued unabated, though it could only be satisfied by erecting houses in Salsette.

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Mr. Murphy, the Special Acquisition Officer, has valued the property on the basis of an hypothetical rent, to the exclusion of all other methods. The claimant after the bungalow had been completed, had occupied the upper floor himself and had occasionally let out the ground floor and parts of the out-houses, so there was no possibility of arriving at the letting value of the whole except by guess-work. Mr. Chambers, for Government, estimated that a fair rent would be Rs. 100 per mensem. Mr. Murphy based his award on a rental of Rs. 120. In his decision he has complained of the attitude adopted by the claimant's legal advisers. The first valuation they brought in was one by Mr. Bryant based on his estimate of the then value of the land plus the value of the buildings. The Company's solicitor contended that this valuation was on a wrong basis, the correct basis being the rental value. Mr. Murphy adopting this contention summarily rejected the claimant's valuation, and apparently expected him to immediately produce a valuation on a rental basis. At a later stage of the proceedings after the Railway Company had opened their case the claimant was allowed as a matter of grace to bring in a valuation also based on an hypothetical rent. Before me both parties have argued the case on the same basis.

Now the income of a property whether actual or imaginary is no doubt one of the recognized starting points for a valuation. The mistake everyone has made in this case lies in thinking that that is the only element to be taken into consideration. In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property is such a commodity, and here, by residential property I mean property which a purchaser wishes to acquire for his own residence. The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration. A man who buys land and builds thereon, does not necessarily produce a marketable commodity of the value of

his outlay but it does not follow that he never does, for if there is a demand for residences in a particular locality and the supply is limited a purchaser will consider not only the procurable rent of houses in the market but the cost to himself of building a new one.

Now I am satisfied that in February 1906 there was a demand for residential property in this locality, that the supply was extremely limited, and that persons of means residing in the native town were anxious to obtain accommodation outside the town during the plague season; further, that the situation of the claimant's property was eminently favourable and that his expenditure on land and building was absolutely normal.

Mr. Chambers, the expert witness for Government, admitted that there was nothing extravagant about the building and that the property could be valued as a residence without fixing on an imaginary rental. Unfortunately Mr. Murphy's award precluded him from forming an unbiased opinion of the value of the property on this basis. The claimant proved that the cost to him had been about Rs. 26,000 but beyond that, he had laid out the compound, planted trees, and brought into existence, as is evident from the photographs put in, an eminently desirable residence available for sale as a going concern. It is not unreasonable for the Court to assume that a purchaser wishing to acquire such a residence in this neighbourhood would realise he could not build at any less cost, in addition he would have to incur considerable trouble and wait for a considerable time before he could enter into residence. If any authority were required for valuing on the basis of cost it can be found in the case of *Government v. Dayal Mulji*⁽¹⁾, where the Court went further than I am prepared to go, by awarding the claimant in addition to the estimated cost of his incomplete building, the present value of his land instead of the original cost. There is no reason why this method should be absolutely barred and the owner compensated on the basis of an imaginary rental merely because he happens to have completed his building before the notification. Taking into account the demand for residential

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(1) (1906) 9 Bom L. R. 99.

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property in this locality, the cost of the property to the owner, its favourable situation and the fact that it possesses absolutely normal features, I consider its market value on the 22nd September 1906 was Rs. 25,000. The claimants' valuation on the basis of a rental of Rs. 185 all the year round cannot be considered a reasonable one. If I am to consider an imaginary rent I do not think any one would pay more than Rs. 140 at the outside. The claimant moreover has attempted to increase his valuation by setting up a scheme for separating 816 square yards from the south end of the compound which he alleges would have a value of its own without interfering with the value of the bungalow. No doubt he did ask his engineer before the 22nd February 1906 to prepare plans for a chawl on the south and west boundaries of his property, but I do not feel confident that he ever meant to carry this into execution. A chawl accommodating 80 or 100 people would certainly have prevented the bungalow from being considered a desirable residence.

Apart from that I am entirely against taking such schemes into consideration. There is no objection to giving surplus land a valuation, but it must really be surplus land. In this case the claimant has walled in and laid out the whole of the land which he clearly bought for the purpose of building a bungalow on it. Supposing I valued 816 square yards proposed to be cut off, at Rs. 3 per square yard, I should certainly consider that the value of the bungalow as a residence would be depreciated to a far greater extent. I regret that there should have been any friction between the Special Acquisition Officer and the claimant's solicitor. I am sure the latter intended no disrespect to an officer who was carrying out with great consideration and ability the work entrusted to him by Government. Unfortunately, having fixed in his mind that the only way to value the property was on the basis of an imaginary rent, he seems to have considered himself precluded from accepting any information or suggestions which were not directly pertinent to such a method. On the other hand it is not desirable that legal practitioners attending before an Acquisition Officer should make reference to what may happen if the case is taken to Court. It is their duty to assist the officer in arriving at a valuation by putting

before him all the information and materials at their disposal. At the same time I deprecate any tendency to treat all such information produced by a claimant with suspicion, and to throw out everything which is not proved according to the rules of evidence which prevail in a Court of Justice, thus necessitating a claimant incurring heavy costs and extending the time occupied by the inquiry to an inordinate length. The Acquisition Officer is in a position to make any inquiry that he may think may help him in making his award but he can hardly expect each individual claimant to produce substantial proof to support his case in respect of details which in the opinion of the officer should be taken into account in making his award.

The claimant has been awarded Rs. 20,205.20. That must be increased by Rs. 4,794.80 to which must be added 15 per cent and interest on the whole at 6 per cent since Government took possession. The claimant must also be paid the costs of this reference.

Attorney for Government: *E. F. Nicholson*, Government Solicitor.

Attorneys for the claimant: Messrs. *Bicknell, Merwanji and Romer*.

K. M.C.I. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

WALBAI, PLAINTIFF, v HEERBAI AND OTHERS, DEFENDANTS.*

Hindu law—Adoption—Mother's sister's son also father's brother's son.

The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son.

The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither Sapindas nor Sagotras.

Ramchandra v. Gopal⁽¹⁾, followed.

* Original Suit No. 244 of 1908

(1) (1908) 32 Bom 619.

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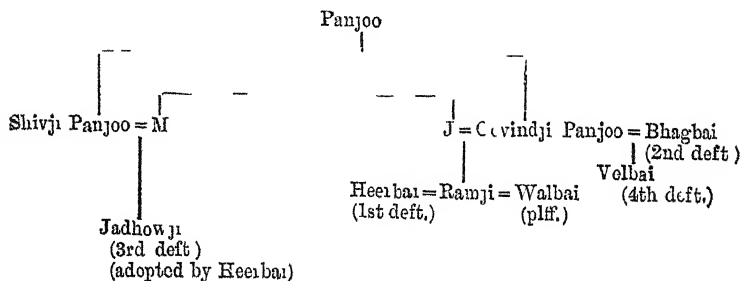
September 3.

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Administration suit.

One Ramji Govindji died in February 1908, leaving him surviving two widows, Heerbai and Walbai, and a step-mother Bhagbai. This suit was originally filed by Walbai the junior widow against Heerbai and Bhagbai, but at a later date Jadhovji, who was alleged to have been adopted by Heerbai since the filing of the suit, and Velbai, the daughter of Bhagbai, were added as 3rd and 4th defendants respectively. Jadhovji in addition to being the son of Ramji's father's brother was also the son of Ramji's mother's sister, the double relationship arising from the fact that two brothers married two sisters. The relationship of the parties is more fully shown by the following genealogical tree:—



A receiver was appointed on the application of the plaintiff.

Various issues were raised between the parties as to the property in certain ornaments and as to the effect of a consent decree in a former suit filed by Bhagbai against Ramji for maintenance; but the most important point at issue and the chief point to which the legal arguments were directed, was the validity of the above-mentioned adoption.

Strangman, Advocate-General, with *Inverarity*, *Raihes* and *Lowndes* for the plaintiff:—

The adoption is invalid. See *Stokes on Hindu Law* at pages 61 and 571. The point was decided once and for all in *Bhagwan Singh v. Bhagwan Singh*⁽¹⁾. And further discussion is in fact now purely academic. See *Sarkar's Hindu Law* at page 150.

Radsha with *Setalwad* for the 1st defendant:—

It is a mistake to lay down that the possibility of lawful marriage with the natural mother is the test. See *Mandlik's* (1) (1898) 21 All. 412.

Hindu Law at page 479. The proper construction of the text of Sakala is to read it as directing the adoption in the first place of a Sapinda or a Sagotra, and in the second place, *failing* a Sapinda or Sagotra, of any stranger except a sister's son, etc. In the present case, Jadhovji was adopted in accordance with the directions of the first part of the text. The second part has no application at all.

Davar with *Jinnah* appeared for the 2nd and 4th defendants.

Bhundarkhar with *Desai* for the 3rd defendants supported the adoption.

Strangman in reply :—

The text does not warrant such a construction. There are no full stops. The exceptions named in the last line refer to the whole text. See *Ramchandra v. Gopal*⁽¹⁾.

MACLEOD, J.—One Ramji Govindji died in February 1908 leaving two widows Heerbai and Walbai, his step-mother Bhagbai, and her daughter Velbai him surviving. In March 1908 Walbai the junior widow, filed this suit for the administration of the estate of Ramji, making Heerbai and Bhagbai defendants. After the suit was filed, Heerbai purported to adopt one Jadhovji the son of Ramji's father's brother and mother's sister. Jadhovji and subsequently Velbai were added as party defendants to this suit. Bhagbai and Velbai thereafter filed suit 602 of 1899 against Ramji claiming maintenance and other relief. By a consent decree of the appellate Court in that suit, a house in Essaji Street was settled on Bhagbai for life in lieu of maintenance and Ramji was directed to set aside a proper sum for the marriage expenses of Velbai. No provision was made for the maintenance of Velbai should her mother die before she was married. Bhagbai was made a party to this suit merely because as the plaintiff alleged she had a life interest in a portion of Ramji's estate; but besides joining with the plaintiff in contesting the validity of the adoption of Jadhovji, she has seized the opportunity of making several claims against

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(1) (1906) 32 Bom. 619 at p. 632.

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Ramji's estate on behalf of herself and Velbai, which must be disposed of before I deal with the validity of the adoption and the further questions in dispute between the plaintiff and defendants 1 and 3. In the first place Bhagbai asked the Court to construe the consent decree in suit 602 of 1899 for the purpose of ascertaining what interest she took in the house in Essaji Street. I do not think it is open to argument that she took anything more than a life interest in that house, which, on her death, will revert to Ramji's heirs. Then it was contended that Velbai's maintenance should be provided for; on the other hand the plaintiff and defendants 1 and 3 argue that as Velbai prayed for maintenance in suit 602 of 1899 and no provision was made for it in the consent decree her claim must be considered as refused. It seems more probable that the question of Velbai's maintenance was overlooked when the consent decree was passed. However it was no doubt intended that Bhagbai should maintain Velbai and if Bhagbai dies before Velbai is married, she will have to be maintained some how out of the family property. There is no necessity now to decide how her maintenance should be provided for under circumstances which may never come into existence. The question as to what is a proper sum to be set aside for the marriage expenses of Velbai and whether the sum of Rs. 3,247 is not sufficient for this purpose, must be decided by the Commissioner

I now come to the claims of Bhagbai against the estate of Ramji for certain ornaments belonging to herself and Velbai, which, she says, she deposited with Ramji a few months before his death.

[After discussing the evidence his Lordship proceeded as follows :—]

I am satisfied that Bhagbai has not proved by direct evidence the deposit of ornaments with Ramji and that she has not proved that any of the ornaments taken possession of by the Receiver except the broken gold necklace belong to her or Velbai.

It remains for me to come to a finding on the 6th issue whether the adoption of the third defendant is invalid on the grounds that he is son of Ramji's mother's sister.

It was held by the Privy Council in *Bhagwan Singh v. Bhagwan Singh*⁽¹⁾ that the text of Sakala cited by the authors of the Dattaka Mimansa and Dattaka Chandrika on the question who can be adopted is authoritative in all parts of India. That text is as follows, according to the literal translation given to the Court during the argument :--

"A son of a Sapinda or also next a Sagotra
A sonless twice born should adopt
In default of son of Sagotra should adopt Agotra
A daughter's son, sister's son and mother's sister's son excepting"

But defendants 1 and 3 argue that the verse should be divided into two parts, that the first permits the adoption of all *Sapindas* and those of the same *Gotra* as the adoptive father without any restriction, and that the second confines the prohibition against the sister's sons, daughter's sons and mother's sister's sons to persons who are neither *Sapindas* nor *Sagotras*, that therefore as the third defendant is the father's brother's son of Ramji, the fact that he is also the mother's sister's son is immaterial.

I should not have been inclined myself to adopt this construction. The double upright strokes appearing at the end of the alternate lines of the text in Ghose's work on Hindu Law page 651 relied on by the 1st defendant as representing full stops, do not appear in the original.

The prohibition seems to me therefore to be general, but in any event I am precluded from holding otherwise by a decision of this Court in *Ramchandra Krishna v. Gopal Dhondo*⁽²⁾ where Chaubal J. at page 632 construes the text as follows:—

"In the order of selection for adoption the first choice is directed in favour of a Sapinda, failing him a Sagotra, and in default of these a stranger, excepting always the specific instances mentioned, viz., a daughter's son, a sister's son, and the mother's sister's son."

I find therefore that the adoption of the third defendant is invalid. There must be a reference to the Commissioner to ascertain :—

- (1) What was the property left by Ramji Govindji ?
- (2) What were his debts ?

(1) (1898) 21 All. 412

(2) (1908) 32 Bom. 619.

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(3) Whether the sum of Rs. 3,247 is sufficient for the betrothal and marriage expenses of Velbai, and if not, what further sum should be allowed?

(4) Which of the ornaments taken possession of by the Receiver belong to Heerbai, Walbai and Ramji's estate respectively?

Attorneys for plaintiff: Messrs. *Captain and Vaidya*.

Attorneys for defendants 1 and 3: Messrs. *Bhaishankar, Kanga and Girdharlal*.

Attorneys for defendants 2 and 4: Messrs. *Thakurdas & Co.*

K. MCI, K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909.
September 23.

SIR CURRIMBOY EBRAHIM AND OTHERS, PLAINTIFFS, v. THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY AND OTHERS, DEFENDANTS.*

City of Bombay Municipal Act (Bom. Act III of 1888), section 251-A, clause (a)—Building—"Directly over or directly under"—Construction.

The words "directly over or directly under" in section 251-A, clause (a), of the City of Bombay Municipal Act (Bom. Act III of 1888) should be understood in the restricted sense of immediately over or immediately under, so that in effect under this section a water-closet may be built so as to be vertically over or under any part of a building provided that a bath-room intervenes.

Where it is not suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense.

THIS matter came before the Court as a special case stated under section 527 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiffs were lessees of a plot of land in Wodehouse Road, Bombay, and, being desirous of building thereon, gave notice of their intention to the defendants in pursuance of the provisions

* Original Suit No. 709 of 1909.

of section 337 (1) of the City of Bombay Municipal Act (Bom. Act III of 1888). The plans, however, were not approved by the Executive Engineer on the ground, *inter alia*, that they contravened the provisions of section 251-A (a) of the said Act, in that they contemplated the construction of certain water-closets in such a position as to be directly over or directly under a part of the building other than another privy or water-closet or bathing-place, bath-room or terrace.

To meet this objection fresh plans were prepared and submitted, according to which the water-closets were still vertically in a line with residential parts of the building, but a bath-room, or part of a bath-room, now intervened to prevent them being immediately over or immediately under such parts.

These plans, however, were also disapproved on the same grounds as before, the defendants maintaining that the words "directly over or directly under" in the clause in question meant "in a direct line with, vertically above or below." The plaintiffs on the other hand contended that the words meant "not only in a direct line with, vertically above or below, but also in contact with or directly adjacent to."

As the parties were unable to come to a satisfactory conclusion on the point, they agreed to state a case for the opinion of the High Court, and accordingly after setting out their respective contentions, submitted the following questions:—

(a) What is the proper construction of section 251-A (a) of the City of Bombay Municipal Act (Bom. Act III of 1888)?

(b) Are the plaintiffs entitled, having regard to the provisions of the said section, to erect water-closets in their said building in accordance with the plan in the 5th paragraph hereof referred to?

Jardine with *Shortt* for the plaintiffs.

Robertson with *Strangman*, Advocate-General, for the defendants.

BACHELOR, J.—This is a case stated for the opinion of the Court under Order XXXVI of the Civil Procedure Code, 1908. The plaintiffs are the lessees of a piece of land situate at Wodehouse Bridge Road, and the defendants are the Municipal

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Commissioner for the City of Bombay and the Municipal Corporation of the City.

The plaintiffs, being minded to build residential chambers on their land, notified the defendants of their intention and submitted for approval the requisite plans and specifications. Objection was taken by the Municipality that the construction of some of the water-closets violated the provisions of clause (a) of section 251-A of the City of Bombay Municipal Act, 1888, as amended by Act V of 1905. That clause runs as follows:—

No person shall build a privy or water-closet in such a position or manner as to be directly over or directly under any room or part of a building other than another privy or water-closet or a bathing-place, bath-room or terrace.

In order to meet this objection the plaintiffs made certain alterations in their plans, which, they submitted, were now outside the prohibition contained in the clause, but the defendants maintained their original objection. The question before us is whether that objection is good in law, and the answer turns on the meaning to be given to the word "directly" in the clause. The plaintiffs contend that the words "directly over or directly under" mean not only vertically over or under, but also immediately over or under, so that in effect a water-closet may be built so as to be vertically over or under any part of a building provided that a bath-room intervenes. The defendants, on the other hand, put a wider construction on the clause and submit that the words "directly over or directly under" mean "in a direct line vertically at any height above or any depth below."

The form of the special case, at it is drawn, does not quite correctly follow the requirements of the Order, but any technical difficulty which might have arisen from this circumstance has been removed by the parties who, through their respective counsel, have assured us that neither side has any desire to appeal from our finding, and that the difference between them will be finally settled by the expression of our opinion as to the meaning of the clause. That being so, we proceed to state the reasons for the opinion to which the arguments on either side have led us.

In the first place we must notice Mr. Robertson's argument that whatever may be the true construction of the clause, the proposed water-closets are within the prohibition, inasmuch as the structural alterations proposed do not remove the defendant's objection, but are merely an attempt to evade the provisions of the clause. In explanation of this point it should be stated that the ground floor of the building is to be a restaurant and that, according to the original plans, the bath-room and the water-closet were to be side by side on the first floor immediately over the restaurant. When objection was taken by the Municipality, under the clause cited, the plaintiffs so altered the position of the water-closet as to bring it immediately over the bath-room, which is immediately over the restaurant. The floors of the bath-room and of the water-closet are built of impervious material so that there are now two impervious floors between the water-closet and the restaurant. Mr. Robertson, however, contends that the water-closet ought even now to be regarded as being immediately over the restaurant and not the less so because as he puts it, a small corner of the bath-room intervenes between the water-closet and the restaurant. But we think that this contention must be disallowed. There may, no doubt, be cases where a structural alteration is so slight in effect as to amount to nothing more than a colourable pretence of doing something which the Act requires to be done substantially; but we do not think that this is such a case. As a matter of plain fact, what is now immediately below the water-closet is the bath-room and not the restaurant; and the truth of this description still remains despite the fact that the water-closet is over, not the whole bath-room, but only a four feet high recess in the bath-room. It follows, therefore, that the position of the water-closet does not contravene the provisions of section 251-A (a) if the plaintiffs' view as to the meaning of this clause is to prevail. In our opinion it ought to prevail.

It is plain that by the phrase "directly over" the draftsman of the Act intended to convey one or other of only two possible alternatives, and seeing that a familiar word lay apt for the purpose of expressing either alternative, it may be regretted that both these words were avoided and the equivocal word "directly"

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was employed. Had the meaning intended been as the plaintiffs suggest, one would have expected "immediately", had the meaning been as the defendants suggest, one would have expected "vertically." But the choice has fallen upon "directly" and we must construe it as best we can. It seems to us that full force is given to the word if we read it as the equivalent of "immediately" which is in accordance with popular modern usage, whereas the more extensive connotation required for the defendant's case would have invited a more precise word and some amplification of the phrase. It is not suggested that the word bears any technical sense in the context in which it occurs, and, therefore, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense, "*ut loquitur vulgus*," as was said by Dr. Lushington in *The Fusilier* ⁽¹⁾. Now whatever may be the interpretation favoured by etymological propriety, we think that current popular usage is against the defendants. If two visitors to a hotel bargained that their rooms should be the one directly over the other, they would hardly be satisfied with rooms which, though in the same vertical line, were three or four storeys apart. In time also as well as in space, it is clear that "directly," *ut loquitur vulgus*, has parted with its original signification: we say that we are coming "directly" without reference to the line of our approach and meaning no more than at once or forthwith. It is true, the original precision is retained in scientific or mathematical usage, but with that we are not concerned: the point is that in popular speech this etymological accuracy has been so far lost that we do not think it can be read into "directly" where the word can receive ample interpretation otherwise. Further support for this view may be found by considering the language of the clause without the word "directly"; for, that should suggest the particular *lacuna* which the insertion of the word was intended to supply. If the clause had read "no person shall build a water-closet in such a position or manner as to be over or under any room or part of a building other than another water-closet or a bathing-place," then a bathing-place at the

(1) (1864) 34 L. J. P. M. & A. 25, 27.

western extremity of the first floor might conceivably have justified a water-closet at the eastern extremity of the second floor; for the water-closet would have been, in a sense, over the bathing-place. It appears to us that the addition of the word "directly" is sufficiently accounted for by an intention to prevent such a construction and that the context does not warrant us in ascribing to the draftsman any wider intention.

As to the argument which was sought to be based on substantial considerations affecting the public health, we think that it is exposed to a two-fold answer: first, that, if effect were to be given to the defendant's contention, the Act would apparently be restrictive beyond all reasonable need, and, secondly and principally, that the Commissioner must be presumed to have entertained no such apprehension in this case, for, had he done so, he would have exercised his wide powers of prohibition under section 246-A of the Act instead of limiting himself to a technical and manifestly doubtful objection under section 251-A (a).

For these reasons we return the following answers to the two questions put in the case.

(a) The words "directly over or directly under" in clause (a) of section 251-A should be understood in the restricted sense contended for by the plaintiffs, and (b) in the affirmative.

There will be a decree accordingly.

Attorneys for plaintiffs: Messrs. *Thakurdas & Co.*

Attorneys for defendants: Messrs. *Crawford, Brown & Co.*

K. M. I. K.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1910.
March 1.

PIRAJI BIN LAXMAN MALI (ORIGINAL PLAINTIFF), APPELLANT, v. GANAPATI BIN RAMJI MALI (ORIGINAL DEFENDANT), RESPONDENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), section 12—Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise.

There is nothing in the provisions of section 12 or in any other section of the Dekkhan Agriculturists' Relief Act 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under section 375 of the Civil Procedure Code of 1882 which is the same as Order XXIII, rule 3 of the Code of 1908.

A compromise means the settlement of a disputed claim.

Where a party complains that a compromise effected in his name by his pleader was unauthorized, he must move the Court to cancel all that has been done and to revive the suit.

Basangowda v. Churchigirigowda⁽¹⁾, followed.

APPEAL from the decision of Ruttonji Mancherji, First Class Subordinate Judge at Poona.

Suit for accounts and redemption.

The property in dispute was mortgaged by plaintiff's father to defendant for Rs. 3,500 on the 15th August 1893. It was again mortgaged on the 31st January 1896 for Rs. 2,500 ; and for Rs. 1,500 on the 25th March 1897. The plaintiff mortgaged it to defendant for Rs. 1,200 on the 17th April 1901. The total amount advanced was Rs. 8,700.

The defendant was in possession of the property.

The plaintiff filed this suit on the 17th January 1908 for account and redemption of the mortgages.

After the issues were settled, the parties applied for and obtained an adjournment of the hearing ; and on the adjourned hearing they presented to the Court a compromise of the suit.

* First Appeal No. 48 of 1909.

⁽¹⁾ (1910) see page 408 ante.

Under the terms of the compromise the amount due at the foot of the mortgage was fixed at Rs. 9,500 for principal and interest; the sum was made payable in yearly instalments of Rs. 500 each; and the question of further interest and costs was left to be determined by the Court.

The Court passed a decree in terms of the compromise. It awarded further interest at the rate of three per cent. per annum; and made the plaintiff bear the defendant's costs.

The plaintiff appealed to the High Court.

L. A. Shah, for the appellant.—The lower Court erred in passing a decree on a so-called compromise. Under the Dekkhan Agriculturists' Relief Act, section 12, the Court is bound to take accounts unless the claim is admitted; and even in that case the Court must record its reasons in writing showing that it is satisfied that the admission is true and made by the debtor with a full knowledge of his rights under the Act; the lower Court has not followed the latter course and hence it was bound to take the accounts under section 12 of the Act.

Further, the judgment of the lower Court clearly shows that after the commencement of this suit and before the issues were raised, the respondent was asked to produce his accounts and to show what he claimed under the mortgage in dispute. The appellant's pleader examined the same and admitted that in so far as the accounts were concerned the amount given by the respondent was correct; yet he disputed the amount of the consideration and therefore a distinct issue on that point was raised. Then comes in the compromise wherein the whole consideration is admitted. Thus there is the admission of the claim.

There is no express provision in the Act about compromises. Again I submit that the compromise is not binding on the appellant as it was entered into by his pleader without any authority from him.

[CHANDAVARKAR, J., referred to *Basangowda v. Churchigirigowda*⁽¹⁾.]

(1) (1910) see page 408 *ante*.

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Lastly, the lower Court was wrong in awarding future interest when it itself says that the respondent has already received past interest almost equal in amount to the principal.

V. G. Ajinkya, for the respondent, was not called upon.

CHANDAVARKAR, J.:—The suit was brought by the appellant to redeem certain mortgages. The plaintiff alleged that the amounts of the mortgages were for past debts except the last mortgage, and that that was for interest due on the previous amounts. The plaintiff claimed relief in the suit as an agriculturist under the Dekkhan Agriculturists' Relief Act. The respondent pleaded that all the mortgages were for cash advances. The suit was fixed for disposal on the 20th of November, 1908. On that date the parties, appearing by their pleaders, asked for and obtained an adjournment upon the ground that they were going to effect a compromise. On the day fixed they appeared again and put in a compromise, embodying certain terms, except as to interest and costs, and the Court was asked to pass a decree in terms of the compromise, and also to give its own directions on the question of interest and costs. Accordingly, the Subordinate Judge, who heard the suit, passed a decree in accordance with the compromise, and also gave certain directions on the question of interest and costs.

That decree has been appealed from. It is contended, in the first place, that such a compromise as the parties entered into could not be recognized by the Court, having regard to the provisions of the Dekkhan Agriculturists' Relief Act, and section 12 is relied upon. No doubt, under the latter part of that section, if the amount of the claim is admitted, and the Court, for reasons to be recorded by it in writing, believes that the admission is true and was made by the debtor with full knowledge of his legal rights as against the creditor, the Court is not bound to take an account as directed by the previous provisions of the section. But the portion of the section, which is relied upon by the appellant, applies where the debtor, appearing before the Court to answer the creditor's claim, admits it. That is different from a compromise. There is nothing in the language of section 12 or in any other section of the Act, which expressly deprives

the parties to a suit of the power of entering into a compromise and of having that compromise recorded under section 375 of the old Civil Procedure Code, which is the same as Order 23, Rule 3, of the Code now in force. Here it cannot be said that it was a case of mere admission by the defendant of the claim. What the Court was asked to do was not indeed to pass a decree on any admission of the defendant, but to make one in terms of the compromise which, after trial commenced, had been deliberately entered into by the parties. A compromise means the settlement of a disputed claim. This view is supported by the decision of this Court in *Gangadhar Sakharam v Mahadu Santaji*⁽¹⁾ where it was said:—"If a creditor and debtor cannot define their mutual relations by the mediation of persons in whom they have confidence, still less should they be allowed to do so unaided, and thus the settlement of accounts would be no settlement unless made by a Court. The foundation would thus be laid for universal litigation, but this is so generally disapproved that it cannot without an express declaration be supposed to have formed a part of the policy of the legislature in this particular instance." And then the Court went on to observe that "the Code of Civil Procedure and the Dekkhan Agriculturists' Relief Act being within the territorial range of the latter, Statutes in *pari materia* must be construed together so as to give effect, so far as possible, to the provisions of each."

That decision has remained undisturbed and unquestioned as law. There have been several amendments of the Act since that decision was reported, and yet the legislature has left it untouched.

It was next argued, however, that this compromise had not been consented to by the appellant; that what was put in was merely a *purskis* of his pleader and that the pleader had no authority, express or implied, to give such a consent. But, as was held by this Court in a recent case, *Basangowda v Churhigirigowda*⁽²⁾, where a party complains that a compromise effected in his name by his pleader was unauthorized, he must move the Court to cancel all that has been done and to revive the suit. Here no

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(1) (1883) 8 Bom. 20.

(2) (1910) see page 403 *ante*

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steps for that purpose, as required by law, have been taken, and we are asked to set aside the compromise on a ground raised for the first time before us while we are concerned with only an appeal. The lower Court was not asked to determine whether it had been misled in the way that it is said to have been in consequence of the alleged want of authority in the appellant's pleader to effect the compromise.

On the question of interest, it is entirely a matter of discretion and we do not think there is any reason in law or equity to interfere with the Court's award. The decree is confirmed with costs, without prejudice to the right, if any, of the appellant to have the compromise set aside on the ground of fraud.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.

April 4.

NARAYAN SHRIDHAR DATE (ORIGINAL DEFENDANT), APPELLANT, v.
PANDURANG BAPUJI DATE (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Wills Act (XXI of 1870), sections 2 and 5—Indian Succession Act (X of 1865), section 187—Administrator-General's Act (II of 1874), section 36—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.

A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by section 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870).

The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of section 187 of the Indian Succession Act (X of 1865).

SECOND appeal from the decision of S. S. Wagle, First Class Subordinate Judge of Thána, with Appellate Powers, confirming

* Second Appeal No. 558 of 1909.

the decree of D. D. Cooper, Second Class Subordinate Judge of Panvel.

One Radhabai, a Hindu widow, resided at Panvel in the Thána District for several years and was possessed of some moveable and immoveable property at that place. On the 1st September 1897, she made a will in favour of Narayan Shridhar Date in whose house she resided at Panvel. Subsequently she set out on a pilgrimage to holy places and on her way back to Panvel she put up with her brother Pandurang Bapuji Date at Bombay. While living with her brother at Bombay, Radhabai became ill and died on the 25th September 1903 after having made a will, dated the 23rd September 1903. Under the will she bequeathed her property to her brother the said Pandurang Bapuji Date. As the property comprised in the will was less than Rs. 1,000 in value, the legatee applied to the Administrator-General of Bombay for a certificate of administration under section 36 of the Administrator-General's Act (II of 1874). The Administrator-General held the necessary inquiry and granted a certificate to Pandurang Bapuji Date, the legatee, on the 16th December 1903. Subsequently the said Narayan Shridhar Date relying upon a certified copy of the will made in his favour by the deceased Radhabai on the 1st September 1897 applied to the Administrator-General to withdraw the certificate granted to Pandurang Bapuji Date, and the Administrator-General on the 25th April 1905 refused to withdraw the grant.

On the strength of the certificate granted by the Administrator-General, Pandurang Bapuji Date filed a suit against the said Narayan Shridhar Date for the recovery of Radhabai's assets in his possession.

The defendant contended *inter alia* that the plaintiff had not obtained probate of Radhabai's will, that the plaintiff derived no title under the said will and that he, the defendant, was the sole legatee under Radhabai's will, dated the 1st September 1897.

The Subordinate Judge found that under the certificate granted by the Administrator-General the plaintiff was entitled to recover the whole of Radhabai's property in the defendant's possession and he passed the decree accordingly.

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The defendant having appealed, the District Judge remanded the case for the purpose of recording evidence in support of the will relied on by the plaintiff. The Subordinate Judge, thereupon, sent for the will from the office of the Administrator-General and having recorded evidence of the attesting witnesses found that the plaintiff had proved the due execution of the will and passed the same decree as before.

On appeal by the defendant the Appellate Court found that the will was duly proved and that the plaintiff was entitled to sue without obtaining probate. The decree of the first Court was, therefore, confirmed.

The defendant preferred a second appeal

M. V. Bhat for the appellant (defendant) :—Radhabai made the will in Bombay, therefore, it is governed by the Hindu Wills Act. Under section 2 of that Act, section 187 of the Indian Succession Act is incorporated in it. Section 187 of the Indian Succession Act is imperative. Under that section it was necessary for the plaintiff to obtain probate to establish his right under the will. The certificate granted by the Administrator-General is of no avail. The plaintiff's suit must therefore fail. The lower Court has relied upon the decision in *Shaik Moosa v. Shaik Essa*⁽¹⁾. But the parties to that suit were Mahomedans who are not governed by the Hindu Wills Act.

G. B. Rele for the respondent (plaintiff) :—The property comprised in the will being less than Rs. 1,000 in value we were entitled to obtain a certificate of administration under section 36 of the Administrator-General's Act. Section 5 of the Hindu Wills Act exempts the Administrator-General from the operation of that Act. Further the certificate granted by the Administrator-General has universal application. It was, therefore, not necessary for us to obtain probate. The certificate of the Administrator-General gives us title to the property comprised in the will.

Bhat in reply.

SCOTT, C. J.:—The only question that we have to decide in this case is whether the certificate of the Administrator-General granted to the plaintiff entitles him to sue for possession of the plaint property without taking out probate of the will under which he claimed as legatee—a will which was made in Bombay and is therefore subject to the provisions of the Hindu Wills Act.

If the certificate of the Administrator-General did not entitle him to sue without taking out probate he would be bound by section 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act to take out probate before he could establish his right as a legatee.

The certificate of the Administrator-General was granted under section 36 of the Administrator-General's Act which states that in cases where the Administrator-General is satisfied that the assests do not exceed one thousand rupees in value, he may, if he thinks fit, if "requested to do so by writing, under the hand of the executor or the widow or other person entitled to administer the effects of the deceased, grant to any person claiming otherwise than as a creditor, to be entitled to a share of such assests, certificates under his hand, entitling the claimant to receive the property therein mentioned, belonging to the estate of the deceased, for value not exceeding in the whole one thousand rupees."

That provision, we think, implies that the certificate when granted will as a matter of law entitle the claimant to receive the property. That that provision of the Administrator-General's Act is not affected by the incorporation in the Hindu Wills Act of the section 187 of the Succession Act, is clear from section 5 of the Hindu Wills Act which provides that "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrators-General of Bengal, Madras and Bombay, respectively."

The plaintiff therefore was entitled to maintain this suit. We confirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

G. B. R.

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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April 10.

VITHAPPA BIN KASHA HEGDE AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. SAVITRI KOM GANAPBHATTA AND ANOTHER
(ORIGINAL DEFENDANTS), RESPONDENTS.*

*Hindu Law—Mitakshara—Daughters inheriting property from their
father—Shares separate and absolute—Tenants-in-common*

In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely.

When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship between them.

In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject.

SECOND appeal from the decision of T. Walker, District Judge of Kanara, reversing the decree of K. G. Kittur, Subordinate Judge of Honavar.

Suit to recover Rs. 65 as balance of rent.

One Vishnu who owned the land in suit died leaving him surviving two daughters, Kuppi and Savitri. Kuppi was married to Rama Hegde and she died in or about the year 1899 leaving her surviving her husband Rama. In the year 1907 Rama Hegde brought the present suit against Kappabhatta Vishnubhatta, the tenant of the land, as defendant 1 and against Savitri, as defendant 2 to recover a share in the rent which devolved on him as heir of his wife Kuppi, deceased.

Defendant 1 denied the plaintiff's right to recover the rent.

Defendant 2 contended *inter alia* that plaintiff's wife Kuppi was not entitled to a share in the estate of her father, she having been well off and possessed of moveable and immoveable property; while the defendant belonged to a poor family and she was entitled to inherit in preference to the plaintiff's wife.

* Second Appeal No. 803 of 1909.

While the suit was pending the plaintiff Rama Hegde died and his nephews were brought on the record as his legal representatives.

The Subordinate Judge found that both Kuppi and Savitri were the heirs to their father. He, therefore, allowed the claim.

On appeal by defendant 2 the District Judge reversed the decree and dismissed the suit on the ground that Kuppi's right of heirship passed to her sister Savitri by survivorship.

The plaintiffs preferred a second appeal.

S. S. Patkar for the appellants (plaintiffs):—The lower Court was wrong in holding that Savitri took by survivorship the interest of Kuppi. Under Hindu Law in the Bombay Presidency the daughter succeeds to an absolute and several estate in her father's immoveable property; *Haribhat v. Damodar-bhat*⁽¹⁾. It is laid down in *Bulakidas v. Keshavlal*⁽²⁾ that in the Bombay Presidency the daughters take not only absolute but several estates. The rule, however, is different in Bengal and Madras. The remarks of Mr. Melvill, J., are very apposite: "This is the view which appears to have generally been taken by the Shastris and to have commended itself to the learned authors of West and Buhler's Digest and it is certainly a far more convenient rule than that of regarding as joint tenants two or more daughters who have married into different families." The ruling in *Rindaban v. Anucharya*⁽³⁾ relates to sisters and approves of the decision in *Haribhat v. Damodar-bhat*⁽¹⁾. West and Buhler in their Digest of Hindu Law at page 106 lay down that daughters take in the Bombay Presidency separate interests excluding the right of survivorship contrary to the rule applied in Bengal and Madras. There is, however, a Privy Council ruling in *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma*⁽⁵⁾ which might be relied on by the other side. The remarks at page 165 favour the opposite contention, but that was a case from Madras where daughters take only a life estate and the law there is quite different as laid down in *Bulakidas v. Keshavlal*⁽²⁾. But the said Privy Council case is

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(1) (1878) 3 Bom. 171.

(2) (1881) 6 Bom. 85.

(3) (1890) 15 Bom. 206.

(4) (1878) 3 Bom. 171.

(5) (1902) 29 I. A. 156.

(6) (1881) 6 Bom. 85.



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explained in *Bai Rukhmīni v. Keshavlal Ranchod* ⁽¹⁾. In *Jogeswar Narain Deo v. Ram Chandra Dutt* ⁽²⁾ the Privy Council have laid down that the principle of joint tenancy is unknown to Hindu Law except in the case of a coparcenary between members of an undivided family. See also *Karuppai Nachiar v. Sankaranarayana Chetty* ⁽³⁾. In the Vyavahar Mayukha, Chapter IV, Section 8, para 10 (Stokes' Hindu Law Books, page 86) it is laid down following the text of Manu that "If there be more daughters than one then they are to divide (the estate) and take (each a share)." This shows that the daughters take an absolute and several estate. Though this case is governed by the Mitakshara, it is laid down in *Bhagwan Vithoba v. Warubai* ⁽⁴⁾ that it is a well established rule of the Bombay High Court that where the Mitakshara is silent and obscure, the Court must, generally speaking, invoke the aid of the Vyavahar Mayukha to interpret it and harmonize both the works so far as that is reasonably possible.

N. A. Shiveshavarkar for respondent 1 (defendant 2) :—The cases cited were governed by the Mayukha and not by the Mitakshara. The present case is governed by the Mitakshara and it must be decided according to the interpretation of the Mitakshara as laid down by the Privy Council in *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma* ⁽⁵⁾. At page 165 their Lordships say that widows succeed jointly, so also daughters. We rely also on *Aumirtolall Bose v. Rajoneekant Mitter* ⁽⁶⁾. The present case is governed by the Mitakshara and it must be decided according to the interpretation put upon the Mitakshara by the Privy Council. Further this case comes from Kanara which, at the beginning of the last century formed part of the Madras Presidency. Therefore cases under the Mayukha would not apply.

Patkar in reply :—The law in Madras is quite different. There the daughters take only a life-interest like the widows and are therefore placed by the Privy Council on the same

(1) (1907) 9 Bom. L. R. 1293.

(2) (1896) 23 Cal. 670.

(3) (1903) 27 Mad. 300.

(4) (1908) 32 Bom. 300.

(5) (1902) 29 I. A. 156.

(6) (1874) 2 I. A. 113.

footing. But as laid down in *Bulakhidas v. Keshavlal*⁽¹⁾ the law in the Bombay Presidency is quite different. It is laid down in a case from Dharwar governed by the Mitakshara that a daughter takes an absolute estate in the property inherited from her father *Gulappa Doningappa v. Tayawa Kempanna*⁽²⁾. The Mayukha is quite clear and according to *Bhagwan Vithoba v. Warubai*⁽³⁾ where the Mitakshara is silent or obscure, the Court should invoke the aid of the Mayukha.

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SCOTT, C. J. :—The question in this appeal is whether the plaintiff or the second defendant was the person entitled as landlord to receive rent from the first defendant for property of which the latter was a *mulgeni* tenant.

The last male owner of the property had two daughters, Kuppi and Savitri. Kuppi was married to Ram Hegde. The heirs of Kuppi's husband, Ram Hegde, are plaintiffs in this case. Savitri is the second defendant.

It is contended that on Kuppi's death Savitri acquired her interest in the property by survivorship. This contention is based upon certain Madras decisions of which the latest is to be found in *Raja Chelikani Venkayamma Garu v. Raja Chelikani Venkataramanayamma*⁽⁴⁾, from which it appears that according to the Mitakshara, as interpreted by the Madras High Court, daughters inheriting from their father take jointly and do not take absolute interests in separate shares.

In the Bombay Presidency, however, it has long been held that a daughter taking property from her father inherits it as *stridhan* and it follows that two daughters taking from their father take their shares separately and absolutely.

The result is that where property so inherited has not been physically divided it is held by them as tenants-in-common and not as joint tenants and between them there can be no survivorship.

(1) (1881) 6 Bom. 85.

(2) (1907) 9 Bom. L. R. 834.

(3) (1908) 32 Bom. 300.

(4) (1902) 29 I. A. 156.

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It has been urged on behalf of the respondent that we ought to follow the rulings applicable to the Madras Presidency, because this case comes from Kanara which, at the beginning of the last century, formed part of the Madras Presidency.

The rule, however, which has been always followed in cases affecting the inheritance of property under Hindu Law is to adhere to the decisions of the Court to which the district from which the case arose is subject; and it has not been contended that in the district of North Kanara any different rule has been laid down by the Bombay High Court from that which applies to the rest of the Presidency in the case of property inherited by daughters from their father.

We, therefore, think that the District Judge has come to an erroneous conclusion in holding that the second defendant succeeded by survivorship to the interest of her sister in the property in suit.

We reverse the decree of the District Court and restore that of the Subordinate Judge.

The defendant No. 2 must pay the costs of this appeal and of the lower appellate Court.

Decree reversed.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

AHMED SULEMAN JUMANI AND ANOTHER (PLAINTIFFS)
 v. BHAGWANDAS VISRAM & Co. (DEFENDANTS).*

1909.
September 1

*Suit for partnership accounts—Limitation Act (IV of 1908) Art 106 -
 Specific assets realised within period of limitation*

If a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit cannot be allowed to proceed speculatively against any and every partnership asset which may have been realised by the defendant after dissolution and within the period of limitation.

Merwanji Hormusji v. Rustomji Burjorji⁽¹⁾ distinguished.

On 7th November 1903, the plaintiffs entered into an agreement with the defendants to carry on a Commission Agency and brokerage business in partnership till 7th November 1904. The partnership was actually dissolved on or about 8th October 1904. This suit was filed by the plaintiffs on 7th November 1907 for the taking of partnership accounts and the payment of their share of the assets. The defendants in their written statement raised the defence (*inter alia*) that the suit was barred by limitation.

Desai with *Jinnah* for the plaintiffs —

If the date mentioned in the agreement be taken as the date of dissolution, the suit is not barred. Further, clause 9 of the agreement provided that the partnership accounts were to be made up on the expiration of 13 months, namely on 9th December 1904; so that time should be deemed to run from that date. In any case, even if it is held that this suit is barred, the plaintiff should be allowed to recover such outstandings as were realised by the defendants after dissolution and within the period of limitation.

See *Know v. Gye*⁽²⁾, *Dayal v. Khatav*⁽³⁾, *Merwanji v. Rustomji*⁽¹⁾.

* Original Suit No. 882 of 1907.

(1) (1882) 6 Bom. C28.

(2) (1872) L. R. 5 H. L. 656.

(3) (1875) 12 B. H. C. 97.

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Wadia with *Pisibhai* for the defendants.

BEAMAN, J. :—I think one of the preliminary objections taken by the defendants proves fatal to the plaintiffs' present claim. Mr. Desai, who has argued the case for the plaintiffs, admits that he is not in a position to call any further evidence upon the question of fact when the partnership was dissolved. The Court must, therefore, come to its conclusion on that point upon the papers which Mr. Wadia for the defendants has put in. The Court has the agreement, an advertisement, and a letter (Exhibits 1, 2 and 3). According to the agreement it would appear that the intention of the parties, when the partnership was formed in 1903, was that it should last till 7th November 1904 with a month over in which to collect outstandings and settle all accounts. The advertisement to which the first plaintiff is himself a party and the letter of April 1907, written on behalf of the second plaintiff, prove conclusively that as a matter of fact, the partnership was dissolved at the latest by the 19th October 1904. That being so, I see no escape from the conclusion that this suit, which was brought for a partnership account and share in partnership profits on the 7th of November 1907 is clearly time-barred. Article 106 of the second Schedule of the Limitation Act enacts that where a suit is, as this suit is, for taking partnership accounts or share in partnership profits, the date from which limitation begins to run is the dissolution of the partnership. The plaintiffs apparently laid considerable stress upon the agreement contained in clause 9 of Exhibit 1, which they appear to think extended, as between the parties themselves, the duration of the partnership by one month beyond the date, whatever that date may have been upon which it was actually and in fact dissolved. But I am unable to accede to any such argument. If partners make an agreement of that sort between themselves, it appears to me that the only effect which could be given to it is that, assuming the partnership lasted up to the contemplated date, neither party could press the other for accounts until the added grace period had expired. But what that has to do with the law of limitation, or how it can operate to extend the period allowed by the Limitation Act, I must own I entirely fail to understand. In this view of the case,

it appears to me too clear to admit of serious argument that the plaintiffs' claim is time-barred. But they have strenuously contended that although so much of their claim, as relates to the taking a general partnership account, may, upon that view of the law, be time-barred, they are at least entitled to ask for a share of any outstandings recovered by the defendants after the 1st of November 1904 and within the period of limitation applying to a suit for moneys had and received. In support of that contention I have been referred to *Knox v. Gye*⁽¹⁾, *Dayal Jairaj v. Khatao Iadha*⁽²⁾ and *Merwanji v. Rustomji*⁽³⁾. But after giving those cases careful consideration I am unable to see that they do sustain the plaintiffs' contention.

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In *Dayal v. Khatao*⁽²⁾, which was decided by Mr. Justice Green, the suit was not for a general partnership account at all. The learned Judge there referred, with approval, to the opinions of three of the learned law Lords who decided *Knox v. Gye*⁽¹⁾. And Latham, J., in giving judgment in *Merwanji v. Rustomji*⁽³⁾ rests upon the decision of Green, J., quoting his excerpts from the decision of their Lordships in *Knox v. Gye*⁽¹⁾. But in *Merwanji v. Rustomji*⁽³⁾, it appears to me that the facts are again easily distinguishable from the facts in this case. There, it is true, the suit was by an ex-partner against a former partner in a firm, which had been dissolved, to share in a definite sum of money which the defendant appears to have admitted to be a partnership asset; and no doubt there are observations, both in the judgment of Latham, J., and in the judgments of their Lordships of appeal in *Knox v. Gye*⁽¹⁾, which may appear on the first reading to lend some colour to the plaintiffs' contention that where a suit for general partnership accounts is barred, the plaintiffs may yet be allowed to proceed as for moneys had and received in respect of any outstanding partnership assets which have come into the defendants' hands within the period of limitation. I am very doubtful myself whether taking the decision in *Knox v. Gye*⁽¹⁾ as a whole and keeping it strictly to its own facts, it can be

(1) (1872) L. R. 5 H. L. 656.

(2) (1875) 12 B. H. C. 97.

(3) (1882) 6 Bom. 628.

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legitimately used to support the reasoning and conclusion which have subsequently been based upon it. As a matter of fact the Lords of Appeal in that case found that the suit by an executor of a deceased partner against a surviving partner was time-barred. Much of their Lordships' reasoning and arguments no doubt turn upon the fact that the surviving partner had received a sum of £2,500 as a partnership asset more than six years after the partnership had been dissolved and, standing alone, no doubt within the period of limitation. But it appears to me that excepting some observations by Lord Hatherley, the gist of the decision, at any rate of the majority, was that that fact alone would not remove the bar of limitation which had been interposed by the lapse of six years since the partnership was dissolved. Nor, speaking with all respect for any observations or opinions of other learned Judges who may seem to favour a contrary view, am I able to understand how, if a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit can be allowed to proceed speculatively against any and every partnership asset which may have been realized by the defendant after dissolution and within the period of limitation. In such a suit, it seems to me, questions would inevitably arise which could not be resolved without opening up the whole partnership account. It appears to me that allowing the plaintiffs to pursue such a course, might result in real hardship and great injustice to the defendants. I have said that this case is clearly distinguishable on its own facts from the authorities I have just been discussing. There is not a word in the plaint asking for any relief of the kind which the plaintiffs now think the Court should grant them. The plaintiffs never so much as allege that any assets have been recovered after November 1904. All their specific prayers are prayers proper to a suit of the kind they really meant to bring, prayers, that is to say, for a general partnership account, to be given their share of any partnership profits which such an account might disclose and that the defendants should bear the costs of resisting them in this suit. Since that is so and I am quite clear that the suit is time-barred, I feel unable to accede to the plaintiffs' alternative contention that they should now be allowed to convert this defective plaint into a plaint merely for the

recovery of moneys had and received on their account by the defendants subsequently to November 7th, 1904.

This being my view, I must dismiss the plaintiffs' suit with all costs upon them, including costs reserved, if any.

Suit dismissed.

Attorneys for the plaintiffs: Messrs *Tayabji, Dayabhai & Co.*

Attorneys for the defendants: Messrs. *Thakordas & Co*

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Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

JOSHI NARBADASHANKAR HURJIVAN, APPELLANT AND DEPENDANT,
v. MAHURADAS GOKULDAS AND ANOTHER, RESPONDENTS AND
PLAINTIFFS *

1910.
January 31.

*Contract—Wagering—Intention of the parties—Payment of
differences—Contract Act (IX of 1872), s. 57.*

There is no authority for the proposition that, because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying section 57 of the Contract Act.

THIS was a suit for damages for breach of contract. The plaintiffs alleged that by certain contracts entered into on 26th and 27th October 1903, the defendant agreed to purchase from the plaintiffs 800 tons of Rangoon rice, delivery to be taken of 400 tons between 22nd February and 7th March 1909, and of the remaining 400 tons between 23rd March and 5th April 1909. On the due dates delivery orders were forwarded to the defendant, but the latter refused to take delivery. As a result the plaintiffs sold the rice by auction and an aggregate loss of Rs. 12,605-6-9 was sustained. The plaintiffs now claimed this sum as damages.

* Original Suit No. 356 of 1909.
Appeal No. 23 of 1909.

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The defendant in his written statement admitted the contracts, but alleged that they were by way of wagering on the fluctuation of the market prices, and that payment of differences only was contemplated by the parties, there being no intention to give or take delivery. He further contended that even if the contracts were genuine, the plaintiffs had committed a breach by not sending the delivery orders in time according to the practice and usage of the market.

The chief issue raised was whether the contracts were by way of wagering or not.

The following was the judgment of Mr. Justice Beaman in the Court below :—

This is a suit to recover on certain forward contracts for the purchase of rice, the due dates of which were the Fagun and Chaitar Vaidas of 1965 corresponding with February-March, and March-April 1909. The plaintiff's contention is that the defendant refused to take delivery as the market had gone against him; consequently the plaintiff sold the goods at his risk and on his account; and now claims the difference between the contract and the market rate. A preliminary difficulty was settled by plaintiff consenting to accept certain rates as the measure of damages. What was realised at the sales and whether or not the sales were *bonâ fide* and properly conducted becomes of no further consequence.

The defence is two fold: (1) General, that the contracts were wagering contracts. (2) That in respect of the contracts for the Fagun Vaida the plaintiff was in fault for not giving the defendant the delivery orders in time. Under the rules of the Rice Merchants Association the plaintiff was bound to do this before 4 P.M. on a certain day, whereas in fact he did not do so till about fifteen minutes later. The latter defence is inconsistent with the former. For it implies that the contracts were genuine. That defence could not be available to the defendant, if his principal defence is true that under other rules of the said Association the contracts were plainly wagering contracts, and were known and intended to be so, on both sides. However, I do not say that the defendant is not entitled to make an

alternative case of this kind. I merely point out that doing so, weakens his position in his main defence. For amongst other criteria of what is and what is not a wagering contract the conduct of the parties is not the least important. I intimated to the defendant that I did not think there was anything in his second line of defence. This was after hearing the evidence upon it. Considering his general defence and all the circumstances of the case, I think, no Court would favour a contention of this kind which is purely technical. And being as it is in doubt, to put it most favourably to the defendant, the Court would not be too anxious to scrutinize the lapse of a minute or two, while it would be ready to doubt the accuracy of the defendant's clock (even assuming his evidence to be more trustworthy on this point than it is) and lean in favour of the evidence for the plaintiff which is at least as good and proves that the tender of delivery orders was well within the prescribed time. If the defendant had been an honest dealer, if the contracts were genuine (it does not follow that they were not because the defendant was a dishonest dealer) I do not think that he, the defendant, would have raised a technical defence of this kind at all, hinging as it does on a variation in time of a few minutes only, the lapse of which could not really have injured him in any way. Some such considerations I intimated, as I have said, to defendant's learned counsel who, in deference to the Court's view, did not further press this point. I may add that on the evidence as it stands I should have had no hesitation in finding that the delivery orders were tendered in time, and, therefore, as a matter of fact, this defence failed.

The general defence splits into two parts.

First, it is contended that as these contracts were made under the rules of the Rice Merchants Association, and as some of those rules at any rate have all the appearance of having been framed to permit and encourage wagering contracts, any contract admittedly made under them must be deemed to be affected with this taint, as possibly referable in certain circumstances to the rules which appear to recognize mere wagers.

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Second, it is contended that whether or no any and all contracts made under these rules are wagering contracts, these contracts certainly were and that to the knowledge and within the intention of both parties.

The case of *Chapsey v. Gill and Co.*⁽¹⁾, which was decided by a Bench of this High Court, certainly appears to lend some colour to the first contention. With all humility I confess that I am unable to follow the reasoning of the learned Judges in that case. It was decided under the rules of the Cotton Association. One of those rules provided that on the happening of certain events contracts were to be settled in a particular way. In the case before it those events had happened and consequently the questions in issue between the parties fell to be decided under that particular rule. The learned Judges thought that the rule contemplated wagering, and so refused to give effect to it. Doubtless that decision is capable of some such extension as the defendant now wishes to give it. But I do not feel that this is necessarily so, or that in dealing with other contracts made under a different set of rules I am bound to accept as binding what is after all only an inferential extension of a more or less conjectured principle. If the defendant's contention on this point is sound, then every contract made under the rules of the Rice Merchants Association would be a wagering contract, because, in certain circumstances, any one of them might be settled under one or other of those rules which have, to say no more, a suspicious appearance of having been framed to permit of wagering. But it cannot be doubted that an immense volume of genuine trade is carried on under those rules, and such a decision, as I am now asked to give, would prove disastrous to the whole rice business of this city.

What is a wagering contract is a question which is constantly coming before the Courts. It may therefore be worth while to resume the leading authorities very briefly, and extract from them, if possible, a principle capable of universal practical application.

(1) (1905) 7 Bom. L. R. 805.

The foundation of our decisions was laid in the two English cases: *In re Gieve*⁽¹⁾ and *Universal Stock Exchange Ltd. v. Strachan*⁽²⁾. In this Court we have *Tod v. Lakhmdas*⁽³⁾, in which Farran, J., laid down a rule, since much commented on, that a contract is a wagering contract only where it was the intention of both parties under no circumstances either to take or give delivery to or from each other.

Then followed *Motilal v. Govindram*⁽⁴⁾, in which Batchelor, J., doubted whether the rule laid down by Farran, J., was not perhaps too broadly expressed, and added observations upon the manner in which Courts were to deal with questions of this kind. This was followed again by Davar, J., in substantially the same terms, in *Hurmukhrai v. Narotamdass*⁽⁵⁾. *Universal Stock Exchange v. Stevens*⁽⁶⁾ appears to be an exception to the rule which now finds general favour, for there possibilities implied in the form of the contract appear to have been allowed to override a strict determination of the real intention of the parties, and therefore of the real nature of the transaction. The reason of decision in *Forget v. Ostigny*⁽⁷⁾ is simple. The appellant there was held to be the respondent's agent; although the respondent might have gained or lost, as the shares he was dealing in rose or fell, the appellant would not. He was to be remunerated by a fixed commission, and, therefore, in the opinion of their Lordships of the Appeal Court, there was no wager between the parties to that suit. It might be doubted whether assuming that the respondent had been gambling with third parties, and the appellant knew it, the appellant could have succeeded under the terms of Bombay Act III of 1865.

Speaking broadly, however, the authorities appear to me to create no difficulty. I think that the dictum of Farran, J., subjected to rigorous analysis, will be found to be perfectly correct. I believe that before a Court can hold a contract, on the face of it genuine, or at any rate not clearly wagering as the contract in *In re Gieve*⁽¹⁾ was, to be a wagering contract, the Court must

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(1) [1899] 1 Q. B. 791.

(4) (1905) 30 Bom. 83.

(2) [1896] A. C. 166

(5) (1907) 9 Bom. L. R. 125.

(3) (1892) 16 Bom. 441 at p. 445.

(6) (1892) 66 L. T. 612.

(7) [1895] A. C. 318.

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be satisfied that the intention of the parties was in no circumstances either to give or take delivery.

But this intention is not to be confounded with capacity. A party may be able to fulfil a contract and yet have no intention whatever of doing so. I am not to be understood as in any way dissenting from the judgments of Batchelor, J., and Davar, J. Rather I may say that in my opinion both these judgments contain an admirable exposition of the processes by which a Court has to arrive at the true intention of the parties, while both of those learned Judges appear to me to say, in no uncertain tones, that it is the intention of the parties and that alone that is to be ascertained and made the decisive factor. But I think that although these judgments are unexceptionable as far as they go, they leave a point, or possibly more than one point, in some uncertainty.

Where both parties are wagering and that can be clearly ascertained, no difficulty is likely to be met. About the best way of ascertaining whether both parties were wagering, notwithstanding the form in which they have embodied their contracts, there can again be little or no difficulty. But there is a class of cases and a common class of cases, which does not seem to have attracted the attention of the learned Judges who have so far dealt in this Court with the general question.

I mean cases in which one party A may be doing a large *bond fide* business, while the other party B may be a pure gambler, and doing no legitimate business at all. The form of the contract may be perfectly proper. A may be ready and able to fulfil his part of the contract. Yet I conceive that if B is really gambling and if A knows that he is gambling, whatever is to be said of the character of the rest of A's business, in his contracts with B he would be gambling as much as B. Surely he would fall within the provisions of Bombay Act III of 1865.

And these are precisely the cases which give rise to the most serious difficulty. It is no answer to B's contention that the contract was a wager, for A to say I had the goods and could have fulfilled my contract, or, I had the money and could have taken delivery of the goods from you. That is not really the question at all. For coming back to Farran, J's rule, we shall

have to decide whether, in all the circumstances of the particular case, A intended to give or take delivery of the goods covered by that particular contract. And the broad universal principle will then require re-statement in a slightly enlarged form. If A usually an honest dealer knew that B was a pure gambler, then any contract which he made with B with that knowledge would be a contract in furtherance of wagering and would fall within the scope of Bombay Act III of 1865, while it would likewise follow, that waiving that consideration, A could not strictly be said to have "intended" to give or take delivery to or from B. Brought into the region of every day practice, this principle would, I expect, cover a great many transactions which are entered into not only in rice but other great staples in this city. I suspect that there are many large dealers doing genuine business, who are not averse from giving clients an occasional gamble. And thus in each case it becomes a pure question of fact.

What was the nature of the particular contract impugned? No more than this can be extracted from the cases. Reduced to their simplest terms they all emphasize one thing and one thing only. The Court must look beneath the surface and find out, if it can, what was in reality the true nature of the contract.

If, for example, we find A, a dealer in rice on a large scale, entering into forward contracts with B, a bootmaker who has no trade in rice at all, nor any means of dealing with rice in large quantities; if we find that such contracts have been made over and over again, embracing goods worth lacs of rupees; but invariably settled by the payment of differences on due date, then I apprehend that notwithstanding the surface propriety of the formal contracts, notwithstanding A's appeals to his great legitimate business, and his assertions that for his part he was always in a position to fulfil his contracts, the Court would hold that as between him and B, the whole series were pure wagers.

And that is in effect the case on which the defendant relies here. Does he substantiate it? It seems almost superfluous to observe that A would start with every presumption in his favour. A *bona fide* dealer on a large scale could only be affected with the

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particular knowledge which would except certain contracts with a certain individual from the ordinary category of the bulk of his contracts, by showing that he had had a series of dealings with that person of such a character that he must have known all about the man himself, and the kind of contract he was in the habit of making. In this case the defendant cannot hope to establish his case in that way because there was no long course of previous dealings, nor were the parties known to each other. Possibly the plaintiff might have known, as one man in the bazaar knows of another, that the defendant was partner in an iron business. But it would not necessarily follow from that that he might not have resolved to launch out into rice dealing with honest trade intentions. Therefore the defendant has fallen back rather on the line of attacking the plaintiff's business and endeavouring to show that it was chiefly a gambling business. Now the plaintiff was doing a very substantial business in various commodities. He had a strong financial backing. True he dealt largely in rice too and seems to have had but poor godown accommodation for the quantities of rice he bought and sold. The duration of his business was short, the firm is now dissolved, and appears to have existed for only three or four years. The maximum of rice shown to have come during any one year into the plaintiff's actual possession is out of all proportion to the extent of his dealings in rice. And from all this the inference is drawn that the plaintiff was himself not a *bona fide* dealer but merely a gambler in differences. Over and above this the defendant strongly relies upon a statement made by the broker who negotiated these contracts. He swears that he told the plaintiff that the defendant only meant to pay or receive differences. If that were true there would be an end of the case. The plaintiff swears that he was not told anything of the kind and the broker himself goes on to say that he regarded these as perfectly genuine contracts. He stoutly repudiates the imputation that he negotiates any wagering contracts. Naturally he would.

I do not, however, think I ought to rely on that unsupported statement by the broker. Setting that on one side the Court has to be guided by such facts as are made clear by the evidence.

First, I am unable to find in any part of it sufficient support for the defendant's allegation that the plaintiff's whole business was sham and wagering. On the contrary it appears to have been a good solid business with plenty of money to back it. If that were so, and part of it at least consisted in buying and selling rice forward, the onus would lie very heavily indeed on the defendant to show that these particular contracts with him were made to the plaintiff's knowledge for no other purpose than wagering on differences. What is his own conduct? He begins by meeting the plaintiff's claim with an assertion that he was only an intermediary to the plaintiff's knowledge. He has abandoned that contention. But the fact that he began by making it, loses none of its significance. If we read all his early correspondence, carried on through Mr. Bhat, we shall see at once that it is utterly inconsistent with his present case. The foundation of all of it is that the contracts were perfectly genuine. He tries to explain that away now by saying that this is part of the usual practice, designed to throw dust in the Court's eyes should either party subsequently wish to sue. First, I do not believe that for a moment. Next, if I did, I should be strongly disposed to allow the attempt to succeed. It is asking a good deal of a Court of equity to come before it with a plea of this kind, and then bolster it up by confessing that everything was done during the earlier stages of the dispute to put a fraud upon the Court. People who indulge in that sort of knavery are not entitled to much consideration, and have themselves to thank if the results turn out contrary to their expectations. Then as to the argument that whether the plaintiff was a *bond fide* dealer or not he must have known that the defendant was not, what evidence is there to support it? The defendant has told his story. He relies strongly on being an iron merchant, and virtually asks whether any man in his senses would believe that a partner in an iron business would launch out suddenly into rice business. He points to the fact that he had no godowns for rice, that he never took delivery or could have taken delivery, and insists that the plaintiff knew all this perfectly well, and therefore when he made these contracts also knew that they were wagering contracts; and that the intention of both parties to them was to settle by payment of differences.

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Now I have said that there was no long previous course of dealings between the plaintiff and the defendant in rice, which might have affected the plaintiff with knowledge of the defendant's real intentions in entering into such contracts. Had there been, the case might have been very different. Evidence has been laid before the Court of how these forward contracts are made in the bazaar. It is only when the contract is on the point of completion that the parties' names are disclosed to each other. Then if one of them distrusts the other, the contract is broken off. Here the plaintiff says he asked who the defendant was and was told that he was a sound man. There is really little risk in making forward contracts of the kind; no risk over and above the fluctuations of the market. It does not appear to me that plaintiff did anything unusual in accepting the broker's recommendations and making the contracts. Further, there is a good deal of evidence to show that the defendant has been speculating in rice for a year or two. In one instance at least he appears to have adopted precisely the same course against one of his vendees who refused to take delivery, as the plaintiff did in this case against him. That is to say, he sold the actual goods at the risk and on the responsibility of the man who had refused to take delivery. All this looks like real business. Of course the defendant explains it away now by saying that every one of those contracts was merely for differences, and that selling the goods really made no material change in the nature of the dealing between him and his vendee. He says that he did not get the price the goods realized, that this in fact, like his early letters to the plaintiff, was all part of the common practice designed to put a cloak of reality about these unsubstantial transactions. But at any rate, supposing the plaintiff had any knowledge at all of the defendant, this is the kind of knowledge he would have had. He would have known that the defendant, like hundreds of others, was a speculator in rice and had been so for some time. He would have known that the defendant had gone through the usual regular business proceedings when one of his vendees refused to take delivery. Why was he to infer from all this vague bazaar knowledge that the defendant was a pure gambler? It is to be observed that the witnesses called for the plaintiff

swear that in many instances the defendant did in fact take and give delivery just as any other *bond fide* dealer in rice would have done. The defendant seeks to meet this by arguing that in no case did he really take or give more than delivery orders. Now, this may be a device in use among gamblers to evade the law. But, on the face of it, it is a regular business method and as effective as taking the goods away and putting them in your own godown. The truth is that if people want to gamble in this covert way and, in order to make the gamble appear a real transaction, wrap it up in all the formalities of a real transaction, it becomes virtually impossible for a Court to say that it is not what it appears to be. A Court may go on "probing into the surrounding circumstances" for ever, and be little or none the wiser. Certainly were there a long course of previous transactions between the parties, every one of which had been settled by paying differences, and had the parties been well known to each other (as in the case I began by supposing, where one of them is, say, a boot-maker) then there would be a good solid ground for inferring the real nature of their speculations, and the true intention of both of them. But where they are hardly known to each other at all, where both are in the open market, and both have been speculating for about the same time in rice, how is one, who has perfectly honest intentions, to know that the other has not? I confess that I do not see any test which could be applied in the sure confidence that it would disclose the truth.

For, unfortunately, whether transactions of the kind now in dispute are genuine or wagering, it appears to me that parties can with moderate care so conceal the real nature of the transaction that it would become impossible for the Court to say positively what that was. Assume that these were genuine transactions. The procedure would have been exactly what it admittedly was. Assume that they were wagering and for all I can see the procedure again would have been admittedly what it was, at any rate up to the point of tendering the delivery orders. And there is absolutely nothing by way of a history of previous relations, or deducible from the trade status of either party, which will yield any satisfactory test.

While I permit myself to say so much, as having a bearing on all cases of the kind, I do not feel any doubt in my mind upon

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the actual case. I have no doubt at all that the defendant was a gambler, and that he never meant to do more than pay and receive differences. Unfortunately that is also an incident (qualifying if necessary for theoretical purposes the "intention to do no more than pay or receive differences", by adding "ordinarily") of a good deal of legitimate trade. Hundreds of contracts for cover in the markets of Bombay and Manchester respectively are, I suspect, made without any very definite intention of taking actual delivery, and are settled by paying differences. Yet unless this were done business in such commodities as cotton could hardly go on. But there is of course a real distinction, though rather an elusive one, between real and unreal transactions of this kind. And I need not go further into that. It is enough to repeat that I have no doubt that in these rice speculations, the defendant meant to gamble and nothing else. But I am equally sure that in a large part at any rate of his rice business the plaintiff was doing honest trade. He has admitted that about half the total of his rice deals were settled by paying differences. But that is not necessarily inconsistent, as far as I can see, with genuine business. As to the rest there was actual buying and selling, real solid business. And I am clear that there is nothing whatever in the transactions now laid before the Court, or in the evidence given to colour them one way or the other, which would justify this Court in holding that they were wagering contracts within the intention of both parties or within the intention of one, and to the knowledge of the other. That I apprehend to be the right way of stating the principle upon which every decision of this kind must turn. Both parties may intend to wager; or one party may intend to wager, and the other party may know that that is his sole intention and knowing it enter into the contract. Where the facts found warrant the Court in adopting either of those statements of fact, then the contract is a wager under the law of this Presidency. But where only one party intends to wager, and the other neither intends himself to wager, nor knows that it is the sole intention of the former, then the contract is not a wagering contract from the point of view of the latter, and he has a right of action on it.

I do not think that any case in which the issue is raised could be clearer than this case is against the defendant. For that

reason I have not gone more minutely into the evidence. When the points to be determined on the evidence are obscure, I usually analyse it exhaustively. I have not thought it necessary to do so in this case because it speaks for itself, and, in view of the brief statement of principles I have attempted, can leave no doubt at all which way the decision of the Court must be.

I find for the plaintiff. The measure of damages has been agreed upon by the parties. When the sum has been ascertained by applying it, the decree will be for that amount with all costs upon the defendant.

The defendant appealed.

Inverarity, with *Lowndes* and *Jinnah*, for the appellant:—

Any contract made under the rules of the Rice Merchants Association must be deemed to be affected with the taint of wagering. Rules 17 and 27 are much wider than the rule discussed in *Chapsey v. Gill & Co.*⁽¹⁾, and yet contracts under that rule were held to be void. The statement by the learned Judge in the Court below that a decision that contracts under the Rice Merchants Association rules were void would have a disastrous effect on an immense volume of genuine trade carried on under these rules, is not supported by evidence. Nor is it in any event a legal consideration. The contracts in this case were certainly by way of wagering, inasmuch as it was known to the plaintiffs that the defendant was a gambler and would only pay differences. The evidence showed that he was an iron merchant and had no godowns for rice; and the plaintiffs' clerk knew this. The plaintiffs' moonim did not deny that previous contracts between the parties had been settled by payment of differences. Further there is evidence to show that the plaintiffs were themselves speculators. Certain transactions appeared in their books, in which delivery was optional,—a fact which brings them within *In re Gieve*⁽²⁾.

It is the true character of the contract that must be looked at and not its outward appearance. See *Universal Stock Exchange, Ltd. v. Strachan*⁽³⁾.

⁽¹⁾ (1905) 7 Bom. L. R. 805.

⁽²⁾ (1899) 1 Q. B. 794.

⁽³⁾ [1896] A. C. 166.

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Counsel also cited *Kong Yee Lone & Co. v. Loujee Nanje* ⁽¹⁾, *Tod v. Lakhmils* ⁽²⁾, *Motilal v. Govindram* ⁽³⁾, and *Hurmukhrai v. Narotamdas* ⁽⁴⁾.

Strangman (Advocate General) with *Robertson* for the respondents:—

The defence is dishonest. The correspondence shows that the contracts were genuine. Rule 17 does not say all that the appellant contends.

With regard to *Chapsey v. Gill & Co.* ⁽⁵⁾ an extension of the decision in that case would be inconsistent with section 57 of the Contract Act.

Inverarity replied.

SCOTT, C. J.:—Two points have been urged by the appellant in this appeal: (1) that according to the rules of the Bombay Rice Merchants Association subject to which the contracts sued on were made both parties were to pay or receive differences and that therefore the contracts were void as wagers; (2) that having regard to all the circumstances of the case it should have been found as a fact that neither party intended that delivery should be taken.

In support of the 1st point reliance is placed upon Rule 17 of the Rice Association Rules. That rule obliges the buyer to accept a delivery order if tendered up to 4 P.M. on the 6th day before the Vaida and provides that on the seller's failure to make such delivery, the contract shall be settled by payment of the difference between the contract rate and the due date rate fixed by the Association.

Whether if the seller failed to give the delivery order in time the conditions imposed by the rules would make the contract a wager is one which we are not called upon to decide for it is found as a fact in the lower Court and not now disputed that all the delivery orders were tendered by the plaintiffs in time. The facts are therefore entirely dissimilar to those in *Chapsey v. Gill & Co.* ⁽⁵⁾ upon which the argument of the appellant is based.

(1) (1901) 29 Cal. 461.

(2) (1882) 16 Bom. 445.

(3) (1905) 30 Bom. 83.

(4) (1907) 9 Bom. L. R. 125.

(5) (1905) 7 Bom. L. R. 895.

There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying section 57 of the Contract Act.

As regards the 2nd point, it is a pure question of fact which has been adequately dealt with by the learned Judge. We see no reason to differ from the conclusion at which he has arrived. We therefore dismiss the appeal with costs.

Appeal dismissed.

Attorneys for the appellants : Messrs. *Hiralal & Co.*

Attorneys for the respondents : Messrs. *J. R. Patel & Co.*

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ORIGINAL CIVIL.

Before Mr. Justice Macleod.

IN THE MATTER OF THE INDIAN COMPANIES ACT VI of 1882

AND

IN THE MATTER OF THE BOMBAY COTTON MANUFACTURING
COMPANY, LIMITED,

AND

IN THE MATTER OF RAJILAL KARSONDAS.

1909.

September 25.

Winning up petition—Petitioner a creditor for amount not immediately payable—General financial position of company—Indian Companies Act (VI of 1882), sections 128, 129, 130 and 131—Scheme of arrangement—Practice.

The definition of "debt" in section 120 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word "creditor". A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor.

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If the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up.

If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement. . . . But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors.

On 2nd September 1909 a petition for the winding up of the Bombay Cotton Manufacturing Company was filed by one Ratilal Karsondas, a creditor of the Company to the extent of Rs. 6,500 lent on fixed deposit account and repayable in April 1910. A provisional liquidator was appointed on 4th September. Further petitions were filed by two other creditors on the 7th and 8th September respectively; and on 9th September by an order of Macleod, J., all three petitions were consolidated.

The various allegations made by the petitioners as to the insolvent condition of the Company and the mis-management by the Directors were strenuously denied by two of the Directors on behalf of the Company, who further contended that the petitioners were not in the position of creditors entitled to present such a petition, in that their debts were not immediately payable.

Before the matter came on for hearing certain other creditors proposed a scheme of arrangement with the view of preventing liquidation and the consequent loss of credit. The terms of this scheme were subsequently modified and agreed upon at a meeting of creditors held on 23rd September. The petitioners, however, submitted that such an arrangement could not be sanctioned by the Court until a formal order for winding up had been made.

Setalwad appeared for the 1st petitioner, Ratilal Karsondas.

Jinnah appeared for the 2nd and 3rd petitioners.

Padshah appeared for other creditors.

Strangman, Advocate General, appeared for the Company.

MACLEOD, J.:—Three petitions have been filed for winding up the Bombay Cotton Manufacturing Company. The first is by Ratilal Karsondas, a creditor for Rs. 6,500 in respect of three deposit receipts, the second by Raja Bahadur Shivilal Motilal, who is a creditor to the extent of three lakhs, one lakh of which is secured by a charge on certain liquid assets of the Company, and the third is by Raju Babaji, who alleges that he has a claim of about Rs. 50,000 in respect of monies due to him for the erection of a weaving shed for the Mill.

The chief allegation on which the prayer for winding up the Company in all these three petitions is based is, that the Company is unable to pay its debts. There are other allegations made regarding the management of the Company to the effect that the affairs of the Company have been grossly mis-managed by the Directors.

The Company oppose these petitions and a large number of creditors have also appeared who are desirous that their interests should be secured by some means or other, either by a winding up order being made, or by some directions of the Court being given. A number of share-holders have also appeared and they are anxious that their interests should be protected.

The grounds on which the Company oppose the petitions fall under two heads. In the first place they take certain technical points. It is contended that the petitioners are not creditors who are entitled to petition under section 131 of the Indian Companies Act. The ground for this contention seems to be, that a creditor must be a person to whom a debt is now due and who can demand immediate payment from the Company before he can petition. That contention seems to be based on the definition of "debt" in section 130. But the definition of "debt" is quite distinct from the meaning of the word "creditor". A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or whether his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor. Otherwise this contention would lead to this absurdity, as I have already observed on an interlocutory application in these

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petitions, that depositors who have lent their monies to the Company would have to stand by and see the assets of the Company dissipated without their being able to seek the protection of the Court. The petitioners Ratilal and Sivalal are clearly creditors entitled to petition under section 131. It may be that the position of Raju B. baji is somewhat different as the amount of his claim if any has yet to be ascertained. But it seems unnecessary to decide whether he is in a position to file a petition, as there are two petitions, which are good, before the Court.

The next contention is that the petitioners have not proved any ground on which the Court can make a winding up order; that the only ground defined under section 128 on which the petitioners can rely is ground (d) "whenever the Company is unable to pay its debts" That is defined in section 129, sub-section (e) (the only part of that section which is relevant to these petitions) as follows:—"Whenever it is proved to the satisfaction of the Court that the Company is unable to pay its debts." The Company argue now that as "debt" is defined in section 130 as debts actually due, therefore the petitioners must prove that the Company is unable to pay debts which are due to-day, and that even if the Court is satisfied that the debts which will fall due to-morrow and any time thereafter cannot be paid, the Court cannot make a winding up order on this ground. Even if that contention, which appears to lead to an absurdity, is correct, it is immaterial, because clause (e) to section 128 makes it possible for the Court to order the winding up whenever for any other reason of a like nature the Court is of opinion that it is just and equitable that the Company should be wound up. And if the Court is satisfied that the Company is unable to pay the debts falling due hereafter that would be a reason of a like nature to (d). It is suggested that reasons under clause (e) must be restricted to reasons of a like nature to those mentioned in the previous clauses (a) to (d) but in the case of *In re Shah Steam Navigation Company of India*⁽¹⁾, Mr. Justice Davar held himself entitled to follow the English practice, and to construe the

(1) (1908, 32 Bom. 415.

section in the same way as the English Courts have construed the corresponding section in the English Act, although the words "for any other reason of a like nature" are omitted in that section. However, I am clearly of opinion that if the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up. The last balance sheet, which has been put before the Court, contains the last audited accounts up to the 30th June 1903. Those accounts were not audited until six months later, and, therefore, I have not got full details of the present position of the Company. But it is admitted that the Company is now a creditor of the Tricunddas Mills to the extent of nearly thirteen lakhs, and a very large amount of that must have been lent to the Tricunddas Mills since the 30th June 1903. The amounts for which acceptances have been given were on that date nearly Rs. 21,00,000 and they must have increased since that date. Now the loan to the Tricunddas Mills was an act not contemplated and not empowered by the Memorandum of Association, and although the shareholders appear in 1908 to have empowered the Directors to lend the funds of the Company to other Companies there can be no doubt that the resolution of the shareholders was *ultra vires*, and that for eleven years, not only the funds of the Company, but the money which was borrowed from the public for the working of the Company, have gone into the pockets of the Agents of the Tricunddas Mills. That amount of thirteen lakhs must now be taken as a very doubtful asset. The Company in trying to establish their solvency have estimated it at 3 lakhs, but I should consider that an over valuation. However that may be, the remaining assets, which they entered in their affidavits with their estimated value, will not on close scrutiny bear the value which has been put upon them by the Company. They have valued the machinery, as it appears on the assets side of the balance sheet, at cost price without deducting the depreciation to the extent of nearly five lakhs which appears on the side of liabilities. Other assets are such that they are not available for the payment of the Company's debts. They are merely available

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for the working of the Mills ; so that if the Company endeavoured with these assets to satisfy the debts of the creditors it would find it impossible to continue working the Mill. Now, it is no doubt the practice for Mill Companies in Bombay in order to work their Mills to borrow money for working capital, but such borrowings should not exceed what is actually required for working purposes and should not exceed to any great extent under careful management the liquid assets, such as cotton, coal, stores, etc. The Company's credit depends on this rule being observed. But it is clear that the borrowing of this Company has been quite out of proportion to what was required for the working of the Mill ; and also to the paid up capital. With the small amount of Rs. 7½ lakhs paid up capital the debts of the Company have amounted to something over Rs 25 lakhs. For the present the Company's credit has gone

If these petitions were dismissed, it is quite clear that the Company would not be able to pay its liabilities as they became due. The only result would be that the first person who obtained a decree against the Company (and I have only recently passed a decree for Rs. 50,000 against it) would proceed in execution of his decree. It appears certain that if I dismissed these petitions there would be other petitions filed immediately afterwards.

I am quite convinced on the affidavits before me that the Company is not in a position to pay its debts, and, therefore, it is desirable that a winding up order should be made. At the same time, there is no doubt that if an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement, so that the interests of the creditors might be protected as well as the interests of the share-holders. Already it appears from the affidavits that suggestions have been made from some sources, which, if they prove effective, would keep the Company going. But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the

minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors. Therefore I shall not sanction any proceedings in the winding up order which might in any way prejudice the chances of a settlement, and the bringing forward of any scheme for carrying on the business of the Company which may be acceptable to the creditors.

The order, then, will be: First of all that the Company be wound up. I propose, then, as I did in the case of the Tricumdas and Lukhmidas Mills to proceed to appoint a Liquidator, although I suggest that he should be provisional for a short time. What I would suggest is that until the 16th October Mr. Sethna be appointed official Liquidator in the same position as he is Liquidator of the Lukhmidas Mill. It is necessary that there should be a Liquidator for the purposes of arranging a compromise and scheme of settlement, but there will be no necessity for the Liquidator to continue after the scheme has been sanctioned by the Court, except for the purpose of giving effect to the scheme.

The official Liquidator will therefore be appointed provisionally.

I have no objection now in the interests of the share-holders to direct that nothing should be done under the order for winding up by the Liquidator beyond carrying on the working of the Mill until further application is made by the Liquidator.

Liquidator to have powers (b), (d) and (f) in section 144.

Under section 138 until further order proceedings to be stayed except as to the carrying on of the business of the Company by the Liquidator.

It is advisable that any proposals for settlement should be crystalized as soon as possible, so that the meeting of the creditors and contributories can be summoned.

I allow the contributories inspection of the directors' minute books and accounts relating to the loans made by and to the Company.

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Costs of the petitioner Ratilal Karsondas and the costs of the Company out of the assets: and one set of costs between the other petitioners and creditors appearing. As the other petitioners had notice of the first petition their costs must be included in the one set of costs allowed to the creditors.

Attorneys for 1st petitioner: Messrs. *Daphtary, Ferreira and Diwan*.

Attorneys for the other petitioners: Messrs. *Bhaishankar, Kanga and Girdharlal*.

Attorneys for the Company: Messrs. *Payne and Co.*

Attorneys for other creditors: Messrs. *Dikshit, Dhunjisha and Sunderdas*.

K. McL. K

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910

February 10.

GULAM HUSSEIN ALIAS KIKABHAI TYABALLI (ORIGINAL PLAINTIFF), APPELLANT, v. MAHAMADALLI IBRAHIMJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 43 and 50—Transfer of Property Act (IV of 1882), section 90—Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realized not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage.

In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor.

* Second Appeal No. 493 of 1906.

The first Court found that the claim for a personal decree against the mortgagor was time-barred

On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant but the appellate Court found that the plaintiff failed in his attempt and confirmed the decree

On second appeal by the plaintiff *held*, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed.

Held, further that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally.

SECOND appeal from the decision of W. Baker, District Judge of Surat, confirming the decree of Chimanlal Lallubhai, First Class Subordinate Judge.

On the 18th April 1887 one Ibrahim Jiva passed a mortgage-bond to the plaintiff. Subsequently the mortgagor having died the plaintiff, on the 18th April 1899, brought a suit against the mortgagor's widow as defendant 1 and his children as defendants 2—4 to recover Rs. 1,999 due under the mortgage. The plaintiff claimed to recover the said amount by sale of the mortgaged property and the balance, if any, from the remaining non-hypothecated property of defendant 1 and of the deceased mortgagor. The decree was, however, passed against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a further decree against the other property of the mortgagor. The Subordinate Judge found that the claim was time-barred and that the plaintiff was not entitled to the further decree prayed for

The plaintiff appealed to the District Court urging *inter alia* that the sum of Rs. 200 was paid by the mortgagor to the plaintiff subsequent to the mortgage, therefore, the claim was not barred by limitation and that the plaintiff should have been allowed an opportunity of proving the payment of interest as

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alleged by him. The District Judge found that the plaintiff was not entitled to adduce evidence to prove the payment of interest and that he was not entitled to a further decree under section 90 of the Transfer of Property Act. The appeal was therefore dismissed with costs. In his judgment the District Judge observed as follows —

Section 50 of the Civil Procedure Code provides that if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaintiff must show the ground upon which exemption from such law is claimed.

It is argued that the plaintiff in the original suit satisfies the requirements of section 50.

The plaintiff, para 5, says that Rs. 7-8-0 were paid as rent. No date is given. It also says 200 were received but as it is not stated on what account it was received, the learned Sub-Judge holds that it was not a payment under the mortgage at all, but on some other account.

What the plaintiff seeks now to prove is that the payment of 200 as interest was made within 6 years of the suit. This fact is stated to be mentioned in the original plaintiff. But the plaintiff merely states that 200 were received and does not give any date or the account on which they were paid. Hence it will appear that the present application contains 2 distinct allegations which are not found in the original plaintiff, first that 200 was paid within six years of the suit and secondly that it was paid as interest. Plaintiff seeks to adduce evidence to prove these allegations. I do not think he can be allowed to do so, it is stated that no fresh allegations are made and that he is not going beyond his original plaintiff. It is argued that the fact of his mentioning this sum of 200 in the plaintiff taken with his request for a remedy against the mortgagor personally should lead the Court to presume that this amount was paid within the period of limitation. I do not see how the Court can make such a presumption when the plaintiff himself does not trouble to explain in his plaintiff how the payment of this sum saves limitation. Even now no date is given of the payment and beyond saying that it was within 6 years plaintiff does not give any information as to when it was paid. Nor is there anything in the application regarding the payment being shown in the debtor's handwriting.

In these circumstances it seems to me that the present allegations are entirely different from those in the original plaintiff, when the personal relief sought was not based on the facts now alleged. In his deposition in the original suit plaintiff did not give the details. It does not appear to me that the rulings cited contemplate the proceedings under section 90 of the Transfer of Property Act being based on an entirely new case and I would therefore hold that plaintiff has no right to set up these new allegations and cannot be allowed to adduce evidence to prove them.

The plaintiff preferred a second appeal.

N. K. Mehta for the appellant (plaintiff) :—Our point is that both the lower Courts erred in not allowing us to adduce evidence to show that our personal remedy against the defendant under section 90 of the Transfer of Property Act was not time-barred. If section 88 of the Act be read in conjunction with section 90 it becomes clear that there are two distinct decrees to be passed—one a substantial decree under section 88 and another under section 90—on the application of the decree-holder in case the net proceeds of any sale under section 89 are insufficient to pay the amount due on the mortgage. The question is whether the personal remedy was within time. We contend that it was not necessary for us to ask for a personal remedy in the plaint or to show that the remedy, if asked for, was still subsisting, as the time for showing that it was not time-barred arose when it was found that the net proceeds of the sale under section 89 were insufficient. If the net proceeds of the sale had been sufficient to pay off the mortgage-debt, an application under section 90 would not have been at all necessary: *Musaheb Zaman Khan v. Inayat-ul-lah*⁽¹⁾ and *Rama Dattu v. Sakharam Linga*⁽²⁾ support our contention.

L. A. Shah for respondents 1, 2 and 4 (defendants 1, 2 and 4) :—The plaintiff asked for a personal remedy in respect of the balance and mentioned the fact of having received Rs. 200 without giving the date of the receipt or the purpose for which that amount was received.

We rely on section 50 of the Civil Procedure Code. The plaint merely stated that Rs. 200 were received but it did not show that receipt kept the personal remedy subsisting. The lower Courts were therefore justified in not allowing the plaintiff to adduce fresh evidence to show that the personal remedy was not time-barred: *Damodar Sakarchand v. Vyanku Gangaram*⁽³⁾.

See, Form of Plaint in a suit on mortgage, No. 109, Sch. IV, Civil Procedure Code of 1882.

N. K. Mehta in reply.

(1) (1892) 14 All. 513.

(2) (1909) 11 Bom. L. R. 1127.

(3) (1906) 31 Bom. 241

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SCOTT, C. J. :—The plaintiff originally sued on the 18th April 1899 to recover Rs 999 due under a mortgage-deed dated the 18th April 1887. He claimed to recover the amount in question by sale of the mortgaged property and any balance from the remaining non-hypothecated property of the first defendant and of the deceased mortgagor.

A decree was passed in his favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property was insufficient to satisfy the decree by Rs. 837 and the plaintiff applied under section 90 of the Transfer of Property Act for a further decree against the other property of the mortgagor.

The Sub-Judge found that the claim was time-baired.

An appeal was then preferred to the District Court on the ground that a sum of Rs. 200 was paid by the mortgagors on account of interest on the mortgage-debt and that therefore the plaintiff's present claim was not barred by limitation and that the plaintiff should have been allowed an opportunity of proving the payment of interest as alleged by him.

The Acting District Judge framed the following issues :—

- (1) Whether the plaintiff is entitled to adduce evidence to prove the payment of interest ?
- (2) Whether he is entitled to a further decree under section 90 of the Transfer of Property Act ?

He decided both the issues against the plaintiff. He says "what the plaintiff seeks now to prove is that the payment of Rs. 200 as interest was made within six years of the suit. This fact is stated to be mentioned in the original plaint. But the plaint merely states that Rs. 200 were received and does not give any date or the account on which they were paid. Hence it will appear that the present application contains two distinct allegations which are not found in the original plaint, first that Rs. 200 was paid within six years of the suit and secondly that it was paid as interest."

We are of opinion that the District Judge came to the right conclusion upon the facts stated by him.

Section 43 of the Code of Civil Procedure of 1882 provides that "A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with the leave of the Court) to sue for any of such remedies he shall not afterwards sue for the remedy so omitted." If therefore he wished to make out a case that he was entitled to a decree against the mortgagor personally or against his unhypothecated property in the event of the sale-proceeds of the mortgaged property being insufficient to pay the mortgage-debt, he was bound to put forward in his plaint the allegations which if established would entitle him to that relief. The mortgage being a mortgage of 18th April 1887 and the suit being a suit of 1899, it is clear that the plaintiff's right to a personal decree would be barred unless he could allege some ground for exemption from the law of limitation.

Section 50 of the Code of 1882 provides that "If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaintiff must show the ground upon which exemption from such law is claimed." The plaintiff did not show any ground for exemption from the law of limitation and therefore if the plaintiff is bound by what is stated in his plaint he cannot obtain the relief which he now seeks. In the case of *Damodar v. Vyanlu*⁽¹⁾ the Court said, "It is clear from the words of section 90 of the Transfer of Property Act that a direction of personal payment by the mortgagor should be in a supplemental decree to be passed when the net proceeds should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for decree under section 90." This assumes that the plaint indicated that debt sued on was legally recoverable at the date of suit.

This view is supported by the form of plaint for a mortgage suit, No. 109, in the Schedule to the Code of 1882, which shows that there should be a prayer in the original plaint for payment to the plaintiff of the amount of the deficiency if the sale-proceeds should not be sufficient for payment of the full amount.

(1) (1906) 31 Bom. 244.

1910.

GULAM
HUSSEIN
v.
MAHAMAD-
ALLI
IBRAHIMJI.

1910.

GULAM
HUSSEIN
v.
MAHAMAD-
ALLI
IBRAHIMJI.

The conclusion, therefore, to which we have come is that the plaintiff cannot be allowed at this stage of the suit to bring forward for the first time allegations which it is necessary to prove in order to show that he is entitled to a further decree against the defendant personally.

Our attention has been called to the decision in *Ram Dattu v. Sakharam Linga*⁽¹⁾. That was a case in which the plaintiff in his plaint had claimed a personal decree although he had not at the original hearing led evidence to prove a subsisting personal obligation. It does not appear that any question of limitation arose which should have been confessed and avoided in the plaint.

We affirm the decision of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1910.

February 28.

GOKULSING BHIKARAM PARDESHI (ORIGINAL PLAINTIFF), APPELLANT, v. KISANSINGH GURU LAXMANGIRI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under section 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.

C sued M on a money-bond. M having died during the pendency of the suit, his widow R and his brother N were brought by C on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be

* Second Appeal No. 245 of 1909.

(1) (1909) 11 Bom. L. R. 1127.

executed both R and N died. C then brought on the record the defendants as the legal representatives of M. The latter denied that they were M's legal representatives or that they had any property of M's which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale, and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of M and defendants' survived to the latter at M's death; and that the plaintiff obtained no title at the Court sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of section 244 of the Code of Civil Procedure, 1882, from asserting their title.

Held, that as the property was sold by the Court at C's instance as that of M, the question so far was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under section 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within section 244 of the Code by reason of the explanation to section 617 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned.

It was contended that whatever might have been the result if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that section 244 did not apply:—

Held, that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit.

The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, A. P., at Násik, confirming the decree passed by B. B. Kunte, Joint Subordinate Judge at Násik.

1910.

GOKULSING
BHIKARAM
v.
KISANSINGH.

1910.

GORULSING
BHIKARAM
v.
KISANSINGH.

Suit to recover possession of property purchased in execution of a decree.

The decree was passed on a money-bond passed by one Mahadevgir in favour of Chinnaji in 1882. During the pendency of the suit Mahadevgir having died, his widow Rahu and his brother Narayangir were brought on the record as his legal representatives. The decree passed was against the property of Mahadevgir.

After the decree was passed but before it could be executed both Rahu and Narayangir died. The decree-holder Chinnaji thereupon brought on the record the names of Kisangir and Nana (defendants) as the legal representatives of Mahadevgir; and sought for execution of the decree by attachment and sale of the property in dispute. It was contended by the defendants in those proceedings that they were not the legal representatives of Mahadevgir and had no property of his into their possession. The Court notwithstanding attached the property: and at the sale it was purchased by the plaintiff on the 12th August 1896. The certificate of sale was issued to him on the 24th June 1905.

The plaintiff brought this suit on the 15th August 1907 to recover possession of the property from the defendants.

It was contended in defence that the property in dispute was the joint family property of Mahadevgir and defendants: and that on the death of the former it devolved upon them by survivorship.

The Subordinate Judge held that the property was the joint family property and that it devolved upon the defendants by survivorship on Mahadevgir's death. He held further that the plaintiff's claim was barred by limitation.

On appeal this decree was confirmed by the lower appellate Court, on grounds which were stated as follows:—

It would appear that the decree-holder Chinnaji showed no regard for truth or law in placing on the record party defendants and judgment-debtors to represent the estate of Mahadevgir for the purposes of the suit and execution of the decree, inasmuch as though he knew as a matter of fact that Mahadevgir was undivided with Narayangir at the time of his death, he joins both Narayangir a brother, and Rahu, his widow, as party defendants, and after

their death defendants 1 and 2, who are brothers to each other and cousin's sons to Mahadevgir, and defendant 3, who was neither an agnate nor cognate relation to the deceased, as judgment-debtors. Though they urged in the course of execution that they were not the heirs or legal representatives of the deceased judgment-debtors, the execution was proceeded with and the right, title and interest of Mahadevgir in the plaint land was sold with all the three defendants as parties on the record. No objection to the attachment of the property seems to have been raised by them in execution and the circumstance of the sale having been made absolute in favour of the plaintiff, with the present defendants as Mahadevgir's legal representatives, has given rise to the contention on behalf of the plaintiff that they are bound by the sale and made it necessary for me to frame the first issue in the case.

This issue should have been raised in the original Court, but as it is one purely of law and as none of the parties would or could attempt to call evidence, I have framed it here and proceeded to determine it myself. In this connection I may remark at once that the contention of the appellant's pleader that the nature of the debt should have been inquired into has no force. The plaint did not allege that the debt was binding on Narayangir or that Mahadevgir had contracted it as manager and it was not competent to the appellant to make a new case in this Court.

Though the present defendants could and should have objected to the plaint property being sold in execution as Mahadevgir's property, their omission to do so does not estop them from raising the contention in this suit, notwithstanding the provisions of section 244 of the Code of Civil Procedure, and the reason is that the plaintiff as purchaser at a Court-sale is not a representative of the decree-holder (I. L. R. 25 Bom. 631) and the provisions of the section which require that questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, etc., should be determined in course of execution and which forbid a separate suit for the same do not come into play.

No doubt in a suit between parties to execution or their representatives the question not raised in the course of execution could not be urged, but as a purchaser at a sale in execution is not a party to the suit (I. L. R. 15 Bom. 290) and as he is a representative of none of the parties, there is no bar of section 244 or of section 13, Civil Procedure Code, to the defendants taking exception to the title of the plaintiff in this suit.

Mahadevgir's interest, which came into existence with him died with him, because he was undivided co-parcener in a Hindu family and because the decree was a mere money decree and no specific charge was created by him during his life-time and because the attachment had not been laid while he was alive.

The plaintiff appealed to the High Court.

1910.

GOKULSING
BHIRARAM
KISANSINGH.

1910.

GOKULSING
BHIKARAM
v.
KISANSINGH.

R. R. Desai, for the appellant (plaintiff). *K. H. Kelkar*,
for the respondents.

The following cases were cited:—*Prosunno Kumar Sanyal v. Kali Das Sanyal*⁽¹⁾; *Madhusudan Das v. Gobinda Priso Chowdhurani*⁽²⁾; *Ram Chandra Mukerjee v. Ranjit Singh*⁽³⁾; *Tara Lal Singh v. Sarobar Singh*⁽⁴⁾; *Collector of Jannpur v. Bithul Das*⁽⁵⁾; *Krishnan v. Arunachulam*⁽⁶⁾; *Kashinath Mureshwar v. Baji Pandurang*⁽⁷⁾; *Trimbak Ramrao v. Govinda*⁽⁸⁾; *Muriqua v. Hayat Sahib*⁽⁹⁾.

CHANDAVARKAR, J.:—The facts found by the lower appellate Court, on which the question of law arising upon this second appeal turns, are shortly these.

Chimnaji valad Ramji brought a suit on a bond against Mahadevgir Gura. The latter having died during the pendency of the suit, his widow Rahu and his brother Narayangir were brought by Chimnaji on the record as the deceased's legal representatives. The suit ended in a decree, awarding the claim out of the property of the deceased. Before execution, both Rahu and Narayangir died. The decree-holder (Chimnaji) then brought on the record the present respondents as legal representatives of the deceased judgment-debtor, Mahadevgir, and applied for execution of the decree by attachment and sale of the property now in dispute. The respondents denied that they were the legal representatives of the deceased, and that they had any property of his which could be liable for the decree. All these objections were, however, negatived by the Court executing the decree and the property in dispute was attached and sold. The present appellant, having purchased it at the Court-sale, sued to recover possession from the respondents.

Both the Courts below have disallowed the claim on the ground that the property in dispute was the joint property of

(1) (1892) 19 Cal. 683.

(2) (1899) 27 Cal. 34.

(3) (1899) 27 Cal. 242, 257.

(4) (1899) 27 Cal. 407.

(5) (1902) 24 All. 291.

(6) (1892) 16 Mad. 447.

(7) (1909) 11 Bom. L. R. 699.

(8) (1894) 19 Bom. 328.

(9) (1898) 23 Bom. 237, 241, 242.

the deceased Mahadevgir and the respondents, held by them as co-parceners in a joint Hindu family, and that on Mahadevgir's death the respondents having acquired an exclusive title to it by survivorship, the appellant obtained no title at the Court-sale which he could legally assert as against the respondents.

In the lower Court it was contended for the appellant that the respondents were debarred by the provisions of section 244 of the Code of Civil Procedure from asserting their title. That Court disallowed the contention, relying on the decision of this Court in *Magantal v. Doshi Mulji*⁽¹⁾.

Act XIV of 1882, which applies to this case, laid down certain procedure as to the execution of a decree for money obtained against a person brought on the record as the legal representative of a deceased judgment-debtor. If such person denied his representative character, the Court executing the decree could either itself decide the question of representation or refer the parties to a separate suit: (section 244, last paragraph). Under section 252, the decree-holder could attach and sell the property of the legal representative in satisfaction of the decree under certain circumstances, *viz.*, when there was no property of the deceased in the possession of the legal representative and the latter had failed to satisfy the Court that he had duly applied such of the deceased's property as had come into his possession.

In the present case, according to the finding of the lower appellate Court, the decree-holder Chimnaji brought the property to sale, although he knew that the respondents were not the deceased Mahadevgir's legal representatives. The property was sold by the Court at the decree-holder's instance as that of the deceased. So far it cannot be denied, and indeed the respondents' pleader before us had to concede, that the question was one relating to the execution of the decree arising between the decree-holder and the respondents as judgment-debtors under section 252. It was, therefore, a question, in relation to them, falling within section 244 of the Code of Civil Procedure by reason of the explanation to section 647 of the

1910.

GOKULSING
BHUKARAM
v.
KISAN SINGH.

(1) (1901) 25 Bom. 631.

1910.

GOKULSING
BHUKARAM
v.
KISANSINGH.

Code, that applications for the execution of decrees are proceedings in suits. The respondents were bound to object to the attachment and the sale under that section, so far as the decree-holder's action was concerned. But they did not object. It is now contended that, whatever might have been the result if the decree-holder had been a party to the present suit, the dispute now is between the auction-purchaser, who is a stranger to the previous suit and the execution proceedings therein, and the respondents, and that, therefore, section 244 does not apply. The answer to that contention is that, though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. That is upon the ground that he is precluded by section 244 from raising the question as a defence in any proceedings other than those under that section. That is the law laid down by the Privy Council in *Prosunno Kumar Sanyal v. Kalidas Sanyal*⁽¹⁾. In their judgment the ruling of the Madras High Court in *Kurigali v. Mayan*⁽²⁾ is referred to by their Lordships with approval. In that Madras case it was held that the question whether the property mentioned in the decree was available for execution was one arising between the decree-holder and the judgment-debtor's legal representative. So in the present case that is substantially the question. The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

(1) (1892) 19 Cal. 683.

(2) (1883) 7 Mad. 255.

This view is not inconsistent with but is supported by the judgment of this Court in *Maganlal v. Doshi Mulji*⁽¹⁾, which is relied upon by the lower appellate Court as warranting its conclusion. In that case the question was simply between the judgment-debtor and the auction-purchaser; and therefore it was held that the question could be tried in a separate suit and that section 244 was no bar. But the judgment in that case explains the Privy Council decision in *Prosunno Kumar Sanyal v. Kalidas Sanyal*⁽²⁾, as applying where the question is virtually between the parties to a suit and the auction-purchaser is affected by its determination.

For these reasons the decrees of the Courts below must be reversed and the claim of the appellant allowed with costs throughout on the respondents.

Appeal allowed.

R. R.

(1) (1901) 25 Bom. 631.

(2) (1892) 19 Cal. 683.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

JAGANNATH RAGHUNATH (ORIGINAL PLAINTIFF), APPELLANT, v.
NARAYAN L. SHETHE (ORIGINAL DEFENDANT), RESPONDENT.*

1910.

March 29.

Hindu Law—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anwa theya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.

The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree: but where they differ, the Mayukha law must prevail.

The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse.

The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belonged to a respectable family.

APPEAL from the decision of Gulabdas Laldas, First Class Subordinate Judge at Thana.

* First Appeal No. 91 of 1906.

1910.

JAGANNATH
RAGHUNATH
v.
NARAYAN

Suit for declaration.

The property in dispute belonged originally to one Laxmibai, who had obtained it after marriage by way of gift from her husband in 1894. Laxmibai died in 1896, leaving a son Elshetti and a daughter Narsubai.

Narsubai was married to one Narsinga, but she did not live with him. She lived with Laxman (defendant No. 2) and had a son born of her by him. Narsubai died in 1903 and a few months after her son also died.

In 1904, Narsinga sold the property in dispute to Jagannath (plaintiff).

The plaintiff filed this suit to establish his title to the property and to recover possession of the same.

Elshetti having died, his son Narayan was sued as defendant No. 1 and Laxman as defendant No. 2.

It was contended for the defence that on Laxmibai's death the property devolved equally on her son Elshetti and her daughter Narsubai; that Narsubai's moiety descended on her death to her son and from him to defendant No. 2.

The Subordinate Judge held that the deed of sale by Narsing to plaintiff was proved; but he found that Narsing did not acquire any title to the property, which on Narsubai's death devolved upon her son. He, therefore, dismissed the suit.

The plaintiff appealed.

The appeal was heard by Chandavarkar and Knight, JJ., on the 30th September 1907. Their Lordships referred certain issues to the lower Court for trial; and in doing so delivered the following interlocutory judgment.

CHANDAVARKAR, J. :—The important point in this case is what is the law by which the community called Kamathis—to which the parties belong—are governed.

In the Court below the pleadings appear to have been framed upon the basis that according to the plaintiff the law governing the parties was that of the Mitakshara. According to the defendants it was the law of the Mayukha. But at the trial it

appears that reliance was placed by the defendants apparently upon the law of the Andhra School in Southern India, because the Kamathis had originally migrated from that part of the country where the Smriti Chandrika is the prevailing authority on Hindu Law. But whether this case was specifically made by the defendants is not quite clear from either the evidence or the judgment. And it appears from the judgment of the Subordinate Judge that he has relied upon the law of the Smriti Chandrika as being applicable to the parties. But no issue was raised to try that particular case and accordingly the evidence led as to it is so meagre that we cannot come to any satisfactory decision upon it as it stands. It is conceded here as it was in the Court below that the Kamathis who have settled in Bombay and other parts of this Presidency originally came about 70 years ago from some part of Deccan Hyderabad. That being common ground between the parties the question is:—What is the Hindu Law by which they were governed in the place from whence they have migrated? And whether since their settlement here and in other parts of the Presidency they have adhered to it or adopted the law of the Mitakshara or Mayukha School prevailing in this Presidency.

According to the decisions of the Privy Council, when any community or family of Hindus migrate from one place to another, they must be held to have adhered to the law of their original place if they have not changed their original manners, habits and customs and religious observances. We think therefore that distinct issues must be raised to try these important points and that additional evidence should be taken. The issues will be as follows :—

(1) Whether the Kamathis settled in this Presidency have abandoned the manners and customs and usages of the place of their origin?

(2) Whether they have adopted the law of the Mitakshara and the Mayukha since their settlement in this Presidency?

The Subordinate Judge should record the evidence that might be adduced by the parties and return it to this Court within 3 months with his findings thereon,

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Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where these agree; where they differ, the Mayukha law must prevail.

The property in dispute belonged originally to one Laxmibai. She had obtained it after marriage by way of gift from her husband on the 11th of January 1894. Therefore it became her *stridhan* of the kind designated in Hindu Law as *anvadhya* or gift subsequent to marriage. Laxmibai died in 1896, leaving a son by name Elshetti and a daughter named Narsubai. As was held by this Court in *Dayaldas Jaldas v. Savitribai*⁽¹⁾, the *anvadhya stridhan* of a woman descends on her death to her sons and daughters jointly, not to the daughters alone. Accordingly, the property in dispute was inherited by Narsubai and her brother Elshetti in equal shares. Narsubai died in 1903, and the question is, who inherited her moiety of the property? It is proved from the evidence in the case that, although Narsubai was married to one Narsinga, yet she lived in adultery with respondent No. 2 and gave birth to a son. When she died, she left her surviving husband and the son. The husband sold the property in dispute to the plaintiff on the 10th of June 1904. Respondent No. 2's case in the Court below was that Narsubai became his lawful wife by marriage after she had obtained a divorce from Narsinga. The Subordinate Judge has held the divorce not proved, and we agree with him. The evidence to prove it is of an unsatisfactory character and establishes no more than that Narsubai lived with respondent No. 2 and had a son by him.

Now the question is, whether her moiety descended on her death to the son born of her in adultery or to her husband Narsinga?

It is contended before us that the son inherited, because the law as to *stridhan* is that a woman's son is heir to it before her husband. But that law applies to a married woman, that is, one whose marriage was celebrated according to one of the recognised forms. When the text-writers say that the *stridhan* of a married woman, who has died "without issue", goes to her husband, if she was married in one of the approved forms, the words

(1) (1909) see *ante* p. 385.

“woman,” “issue” and “husband” were intended to be used as correlative, or, as Vijnaneshwara in another part of the *Mitakshara* terms it, in the *prati yongila* sense, to show that the issue contemplated was issue of the woman by her husband and none else. Therefore, where a woman was married according to the approved form, the term “dies without any issue” means issue of that marriage. There is no authority whatever in the Hindu Law for the proposition, which is contended for by Mr. Pradhan, that, when the competition is between the husband and a son born of the woman by adulterous intercourse, that son supersedes the husband as heir to the stridhan.

It is next contended by Mr. Pradhan that we must presume under the circumstances of this case that the marriage of Narsubai with Narsinga was according to the unapproved form. That, however, is not the law. See *Mussumat Thakoor Deyhee v. Rai Baluk Ram*⁽¹⁾, *Gojabai v. Shreemant Shahajirao Maloji Raje Bhosle*⁽²⁾. Even among Shudras, the law will presume the marriage to have been according to the approved form, if the parties belong to a respectable family. The Kamathis are an intelligent and respectable section of the Hindu community. We must, therefore, act upon the presumption that the marriage of Narsubai was according to one of the approved forms. Under these circumstances, the plaintiff obtained a valid title from the sale of the property to him by Narsubai's husband, and, therefore, he is entitled to half a share in the property in dispute.

We reverse the decree and allow the plaintiff's claim to the extent of a moiety of the property.

Costs throughout in proportion.

We also direct an inquiry as to mesne profits of a moiety of the property from the institution of the suit until—

- (i) The delivery of possession to the decree-holder, or
- (ii) The relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
- (iii) The expiration of three years from the date of the decree, whichever event first occurs.

R. R.

⁽¹⁾ (1866) 11 M. I. A. 139.

⁽²⁾ (1892) 17 Bom. 414.

1910.

JAGANNATH
RAGHUNATH

v.
NARAIAN.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1910
June 23.

YELLAPPA BIN RAMAPPA KURI (ORIGINAL DEFENDANT NO. 2),
APPELLANT, v MARLINGAPPA BIN CHAVADAPPA AND ANOTHER
(ORIGINAL PLAINTIFFS), RESPONDENTS *

Shetsanadi † lands—Rules framed under Act XI of 1852 (Bombay) ‡—
Government continuing the *shetsanadi* lands to the family of the *shetsanadi*
who is discharged by Government without any fault on his part—Con-
tinuance on condition of paying full survey assessment on the lands—
Subsequent resumption of the lands by Government

On the death in 1865 of the then *shetsanadi*, one B, Government appointed one Y as the new *shetsanadi*, but under the rules framed under Bombay Act XI of 1852, Government continued the *shetsanadi* lands to the family of B on condition of their paying full survey assessment on the lands. The remuneration of Y was made payable out of the extra assessment recovered in 1905. Government resumed the lands and handed them over to Y for his services.

Held, that both the order passed in 1865 and the action taken under the rule framed under Bombay Act XI of 1852 had in law the effect of converting the land from a *shetsanadi vatan* into a *rayatwari* holding and investing the holder of the land with the rights of an ordinary occupant, entitled to it, so long as he paid the survey assessment.

* First Appeal No. 1 of 1908.

† The *shetsanadi* is one holding issued on grant of lands for military service, applied especially to a local militia acting also as police and garrisons of forts; also an assignment or grant of revenue of land for certain services; the assignment, as well as the office, may be hereditary—*Wilso's Glossary of Anglo-Indian Terms*.

‡ 1. The Honourable the Governor in Council affirms the principle that the lands of a *shetsanadi* are liable to be resumed and given to another if the holder misconducts himself. In reserving this right, however, the Governor in Council rules that it shall be exercised only in cases of extreme misconduct.

3. In ordinary cases of misconduct the dismissed *shetsanadi* will be allowed to remain in possession of the land, but the lands will be subjected to full assessment and to a further payment, if necessary, to make up the remuneration of the person employed to perform service.

5. Whenever a *shetsanadi* is discharged without fault because the service is no longer required, the land will remain in his possession subject to the survey assessment and no further demand can be made.

Held, also, that the proceedings of 1905 were on the supposition that what was done in 1885 on B's death had the effect of continuing the lands in dispute as one reserved for *shetsanadi* service; but that was not its effect, and the proceedings in question were *ultra vires*.

APPEAL from the decision of T. D. Fry, District Judge of Dharwar.

One Bashya was the registered *shetsanadi* and as such certain lands were continued to him by Government free from assessment as remuneration for his services.

On his death in 1865, Government appointed one Yellappa as the new *shetsanadi*; but under the rules framed under Bombay Act XI of 1852, Government continued the lands to the family of Bashya on condition of paying to Government full survey assessment on the lands. The remuneration of the new *shetsanadi*, Yellappa, was arranged to be paid out of the extra assessment thus levied.

Yellava, the mother and heir of Bashya, was in enjoyment of the lands. She sold them to the plaintiffs in 1876.

In 1883, on the application of Yellappa, Government started an enquiry into the question whether they could resume the lands and place them in Yellappa's possession. It was decided that they could not. In 1905, Government again started a similar enquiry, resumed the lands and placed them in Yellappa's possession.

The plaintiff filed this suit against the Secretary of State for India in Council (defendant No 1) and Yellappa (defendant No 2), to obtain a declaration of title and to recover possession of the lands.

The defendants contended *inter alia* that the orders complained of by the plaintiffs were legally passed under the rules framed under Bombay Act XI of 1852.

The District Judge decreed the plaintiffs' claim holding that they were not liable to eviction under the rules. The grounds of his judgment were expressed as follows :—

The heirs of the deceased had to pay full assessment to Government and had no further obligation of any sort. It need hardly be added that they were in no way concerned with the manner in which Government might deal with the

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assessment levied. They ceased to be *shetsanadis* and no longer enjoyed the exemption which had been allowed them while they were still *shetsanadis*. From the date of the Collector's order they became ordinary occupants as defined in section 3 (16) of the Land Revenue Code and it will hardly be suggested that, holding as they did in that capacity, their alienee would legally be subjected to the treatment meted out to him in this case.

Clearly the Collector was following this last rule when he passed the order which I have quoted. As I read that rule it gave the *shetsanadi* an "occupancy" on full assessment in lieu of his more favoured tenure. If the services of Bashya had been dispensed with during his lifetime, he would have become an ordinary occupant with nothing whatever to distinguish him from the ordinary rayat whose rights are hereditary and transferable. If on his death the Collector has taken away the land itself, he would have been treating the family with the severity allowed only in case of extreme misconduct.

When it is remembered that these rules provided for the remuneration of the person performing the service, it seems clear that Government did not and could not look for further liability in that land. They "resumed" the land in the sense in which that term is generally understood when applied to inam land. In other words they make it *khalsa* and with this imposition of full assessment the favoured tenure of the *shetsanadi* became the "occupancy" of the ordinary cultivator.

The Collector following as in duty bound the directions of Government levied full assessment on the land of a *shetsanadi* the continuance of whose office was no longer necessary, and on condition of payment of full assessment granted the occupancy to the *shetsanadi* heirs. There the relations between Government and the occupants ceased and I can imagine no circumstances which could legally justify the removal of these occupants or those claiming under them with a view to the transfer of their rights to the person holding the office of the *shetsanadi*.

I am not dealing here with what might be equitable. I look on the matter from the strictly legal point of view and my conclusion is that Government had no better right to vest the plaintiff than they would have to eject the neighbouring tenant on the ground that his land should preferably be with the Kulkarni as part of his remuneration.

I hold that no particle of liability other than payment of assessment adhered to the land when it was continued to Bashya's heirs (even if any liability ever existed) and that these heirs had as much right to alienate their holding as is recognized in the case of all occupants under the Land Revenue Code and consider the case as I may I cannot perceive any alternative to this finding.

The defendant No. 2 appealed to the High Court.

G. S. Rao, for the appellant.

D. A. Khare, for the respondents.

CHANDAVARKAR, J.:—It has not been contended before us, nor does it appear to have been contended in the Court below by either of the defendants, that the orders passed, and the action taken by the Collector in consequence of those orders in 1865, were illegal. One of the rules then in force and having the force of law under Act XI of 1852 provided that in case of the discharge of a *shetsanadi* "without fault" but because his service was no longer required, his *shetsanadi* land should be allowed to remain in his possession, subject to the survey assessment, and that no further demand could be made. And this is substantially what the Collector did in respect of the land in dispute on the death of Bashya in 1865. The *shetsanadi* service required of Bashya's branch of the family was dispensed with upon the ground that there was no necessity for it; full survey assessment was imposed upon the land; and Bashya's heir was allowed to remain in possession, subject to the survey assessment. After that, no further demand could be made from the person let into possession on that condition. Both the order passed and the action taken under the rule had in law the effect of converting the land from a *shetsanadi vatan* into a *rayatwari* holding and investing the holder of the land with the rights of an ordinary occupant, entitled to it so long as he paid the survey assessment.

But it is urged for the appellant, who was the 2nd defendant in the Court below, that in 1865 the Collector also entered the land in the appellant's name in the revenue records as a *shetsanadi* holding and that he also ordered a portion of the amount of the assessment payable by Bashya to be paid to the appellant for his services as a *shetsanadi*. The appellant's pleader has not been able to show why the land was entered in his client's name in the revenue records as a *shetsanadi vatan* contrary to the implication of the rule just mentioned. The action taken under that rule conferred a certain right upon Bashya's heir; and the mere entry could not affect that right or preserve that as a *vatan* which, in virtue of the action of the authorities under or on the analogy of the rule, had ceased to partake of that character. The land was not made over to the appellant; nor were its profits as such charged with the remuneration for his services as a *shetsanadi*. He had held the office of *shetsanadi* independ-

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ently of this land in Bashya's lifetime; and on the latter's death all that was done was that his remuneration for that service was increased and the enhanced amount was made payable, not from the land in dispute, but out of the assessment, payable to Government by its occupant. That was an arrangement between the appellant and Government, which could not prejudice the rights of Bashya's heir in the absence of any law affecting that right.

The proceedings adopted by the Collector in 1883 and in 1905, on which the appellant relies in support of his case, were on the supposition that what was done in 1865 on Bashya's death had the effect of continuing the land in dispute as one reserved for *shetsanadi* service. That was not its effect and the proceedings in question were, in our opinion, *ultra vires* of the Collector.

This is the conclusion arrived at by the learned District Judge in his lucid judgment, and we entirely agree with him.

His decree under appeal must be confirmed with costs.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod

1910.

March 11.

JOHN GEORGE DOBSON, PLAINTIFF, v THE KRISHNA
MILLS, LTD, DEFENDANTS *

Letters Patent, clauses 12 and 14—Cause of action arising partly within jurisdiction—Further cause of action arising wholly outside jurisdiction—Joinder—Time of application.

An application under clause 14 of the Letters Patent to join a further cause of action arising wholly outside the jurisdiction, can be made in a case in which leave to sue has to be obtained under clause 12, nor is there anything in clause 14 to show that this application must be made before the plaint is filed. There is nothing to prevent the plaintiff making the application at any time before the hearing, but it would certainly be advisable for him to make it at the time the plaint is presented.

* Original Suit No. 64 of 1910.

PROCEEDINGS in Chambers.

The plaintiff, having obtained leave to sue under clause 12 of the Letters Patent, took out a summons calling on the defendants to show cause why he should not be allowed under clause 14 of the Letters Patent to join a further cause of action arising wholly outside the jurisdiction.

Inverarity appeared for the defendants to show cause.

Shortt appeared for the plaintiff in support of the summons.

MACLEOD, J.:—The plaintiff in this suit is a merchant carrying on business at Manchester in England. The defendants are a Registered Company carrying on business at Beawar outside the jurisdiction of this High Court. In 1907 the plaintiff commenced to contract with the defendants to sell their yarns which the defendants were to pay for in Bombay against documents, and shipments of yarn were made in pursuance of such contracts. In respect of one contract after a portion of the yarn contracted for had been taken delivery of by the defendants, they gave notice to the plaintiff that they would not take delivery of the remainder owing to inferiority of quality. The plaintiff accordingly did not ship the balance and claims as damages the difference between the contract price and the market price at the date of the notice. I shall call this claim A. In respect of yarn shipped under another contract the defendants refused to take delivery. The plaintiff claims the value of this shipment with interest and charges. I shall call this claim B. In October 1907 the defendants consigned to the plaintiff in England 11 bales of yarn for sale and the plaintiff advanced £100 against this shipment. The account sales showed a balance of £15 due to the plaintiff which the defendants have refused to pay and the plaintiff seeks to recover this sum from the defendants. I shall call this claim C. It is obvious that in the case of claims A and B the cause of action arose only in part within the local limits of the Ordinary Original Jurisdiction of this Court and that in the case of claim C the cause of action arose wholly outside the said limits. But in para 13 of the plaint it is merely stated that the cause of action in respect of the said claims and in particular in respect of claim B arose partly in

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Bombay within the jurisdiction of the Court, without any mention being made that the cause of action in respect of claim C arose wholly out of the jurisdiction.

Accordingly when the plaint was presented on the 25th January 1910 to the Judge in Chambers, leave was granted under clause 12 of the Letters Patent.

The plaintiff then proceeded to take out this summons calling upon the defendant to show cause why he should not be permitted to join together in one suit the several causes of action set out or appearing in the plaint and proceed to trial at the same time upon all such causes of action in the suit as framed. The application is made under clause 14 of the Letters Patent which is as follows :—

And we do further ordain that where plaintiff has several causes of action against defendant, such causes of action not being for land or other immoveable property, the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined in one suit, and to make such order for trial for the same as to the High Court shall seem fit.

The defendants have raised two objections :

(1) That an application under clause 14 cannot be made in a case in which leave has to be obtained under clause 12 in respect of the other causes of action.

(2) That in any event the application should be made before the plaint is filed.

Now the Court has original jurisdiction in respect of a cause of action arising partly within the local limits provided the leave of the Court has first been obtained. Therefore in this case as soon as leave had been obtained the Court had original jurisdiction in respect of claims A and B. It then became lawful for the Court to call on the defendants to show cause why the cause of action in respect of claim C should not be joined in the suit and there is nothing in clause 14 to show that this must be done before the plaint is filed. If no application was made under clause 14 that part of the plaint which related to claim C would be struck out as soon as the case came on for hearing, but as far as I can see there is nothing to

prevent the plaintiff making the application at any time before the hearing. However, apart from other circumstances, the measure of his success would probably depend on the application being made at the earliest opportunity, and it would certainly be advisable for a plaintiff to make an application under clause 14 at the time the plaint is presented. On the merits I see no reason why the cause of action in respect of claim C should not be tried in this suit. Evidence will have to be taken regarding the contracts for purchases of yarn by the defendants from the plaintiff, and neither party will be embarrassed by the inclusion of evidence regarding the contract for the sale of yarn by the defendants to the plaintiff.

Summons absolute.

K. M^CI. K.

Attorneys for the plaintiff:—Messrs *Smetham, Byrne & Co.*

Attorneys for the defendants:—Messrs. *Bicknell, Merwanji & Romer.*

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Batchelor.

VITHAL NARAYAN KARANDIKAR AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. MARUTI NARAYAN KALE, HEIR AND LEGAL REPRESENTATIVE OF SUNDRABAI, DECEASED, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1910.

April 12.

Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective.

An award under which family property was divided among co-sharers provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for a certain sum and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. Subsequently a portion of the house belonging to one co-sharer having been sold in execution of a decree against him, it was purchased by an outsider. The

* Second Appeal No. 155 of 1907.

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sons of one of the other co-sharers, thereupon, having brought a suit for a declaration that the Court-sale was not binding upon them,

Held that the term of pre-emption in the award was contemplated to attach to sales made privately and willingly and not to attachment and sales *in invitum* the judgment-debtor.

SECOND appeal from the decision of V. V. Vagh, Joint First Class Subordinate Judge of Poona with appellate powers, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

The facts of the case were as follows :—

Three co-sharers Dattatraya, Narayan and Balvant effected partition of family property under an award of arbitrators dated the 30th November 1880. One of the conditions of the award was as follows :—

In case of a sale by any of the brothers of his portion of the house of residence he should sell it to his brother for the aforesaid price (Rs. 1,800). He should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (brothers) are not willing to buy it. In case of making a mortgage of the same the brothers must have precedence up to the amount of Rs. 1,700 and the term of notice in regard to sale shall hold good in case of mortgage.

Afterwards one Sundrabai obtained a decree against Dattatraya, one of the co-sharers, and in execution got his share in the said house attached. Thereupon the present plaintiffs, that is, the sons of Narayan, another co-sharer, intervened by a petition and sought to have the attachment raised but their petition was dismissed for want of prosecution. The attached share of Dattatraya was then sold in the execution-proceedings and it was purchased at auction by one Vishnu Shankar Gore.

After the Court-sale the plaintiffs, that is, the sons of Narayan, brought the present suit on the 26th July 1904 against Sundrabai, the judgment-creditor of Dattatraya, as defendant 1, Parvatibai, widow of Dattatraya the judgment-debtor, as defendant 2, and Vishnu Shankar Gore, the auction-purchaser, as defendant 3. The plaintiffs prayed among other things for a declaration that Dattatraya's share in the house of residence was not liable to be sold in execution of the decree against him, that, if at all, the right to receive Rs. 1,800 as the value of the

share was liable to be sold under the terms of the award and that the execution-sale was null and void.

Defendant 1 was absent though duly served.

Defendant 2 contended that the suit to enforce one of the terms of the award could lie.

Defendant 3 answered *inter alia* that he had purchased the property at auction-sale for valuable consideration and that the provision in the award was not capable of the construction which the plaintiffs contended for.

The Subordinate Judge found that the provision in the award was not binding on defendant 3 the auction-purchaser, that the term in the award regarding the co-sharer's right of pre-emption was not capable of bearing the interpretation sought to be put upon it by the plaintiffs and that defendants 1 and 3 who were strangers to the award were not bound by it. He, therefore, dismissed the suit.

On appeal by the plaintiffs the Appellate Court relying on the decision in *Shaikh Ferasut Ali v. Ashootosh Roy Singh*⁽¹⁾ confirmed the decree.

The plaintiffs preferred a second appeal.

S. V. Bhandarkar for the appellants (plaintiff):—Our first contention is that what was attachable under the terms of the award was the value of the share in the house, namely, Rs 1,800 and not the portion of the house itself. Next we contend that the right of pre-emption runs with the property. It is not purely a personal right. It is incident to or arises out of the ownership of immoveable property: *Karim Baksh Khan v. Phula Bibi*.⁽²⁾

M. V. Bhat for respondent 3 (defendant 3):—The right of pre-emption as given and enjoyed by law and custom is generally sought to be exercised in connection with transactions between individuals. The privilege does not attach to sales held at the instance of the Court in execution of a decree: *Shaikh Ferasut Ali v. Ashootosh Roy Singh*⁽¹⁾. The language of the proviso in the

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(1) (1871) 15 W. R. 455.

(2) (1886) 8 All. 102.

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award clearly shows that the right of pre-emption was intended to apply to private sales and not to sales *in invitum* the judgment-debtor.

SCOTT, C. J.:—In this case the plaintiffs sue as heirs of Narayan Govind Karandikar to have it declared that a purchase at a Court-sale by the third defendant is not binding upon them. They based their claim upon the fact that by an award under which certain family property was divided between their father and his two co-sharers of whom one is the judgment-debtor, it was provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for the aforesaid price of Rs. 1,800, and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (the co-sharers) were not willing to buy it.

It was held by the first Court that the correct reading and interpretation of the words "if any one should have occasion to sell his share of the house of residence" was that the term of pre-emption was contemplated to attach to sales made privately and willingly and that therefore the attachment and sale *in invitum* the judgment-debtor was legal and proper.

In the lower Appellate Court the same conclusion was arrived at upon the authority of *Shaikh Ferasut Ali v. Ashootosh Roy Singh*⁽¹⁾ where the learned Judges say "the only other privilege which the brothers had left to them under the ikrar was the right to become purchasers by pre-emption of Mohabharut's share in the event of Mohabharut selling; but Mohabharut has not sold his share. It has been sold it is true, but by the action of the Court in execution of a decree passed against Mohabharut, which is quite a different thing. Moreover, if the plaintiffs Ashootosh and Joykishen wished to purchase their brother's share, they could easily have done so by bidding at the sale which took place in execution of the decree." These observations are directly applicable to the case before us.

It is argued, however, on behalf of the appellants that upon the authority of *Karim Baksh Khan v. Phula Bibi*⁽¹⁾ the right of pre-emption is a right running with the land.

Whether the right of pre-emption in the present case is a right running with the land or not we do not decide, but if it is, it is not a right which will render the purchase in execution invalid. At most it would give the owner of the right a title to exercise that right as against the purchaser if the purchaser intended to sell voluntarily at some future date.

We therefore dismiss the appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1886) 8 All. 102.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Batcherlor.

BASLINGAPPA PARAPPA AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v DHARMAPPA BASAPPA AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

1910.

June 16

*Public road—Right of marching in procession with a car—Suit for
declaration of right—Injunction restraining interference with the right*

Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved.

On second appeal by the plaintiffs *held*, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege.

Sadqopachariar v. A. Rama Rao⁽¹⁾ followed.

* Second Appeal No. 346 of 1907.

(1) (1902) 26 Mad. 376.

1910.

BASLINGAPPA
PARAPPADHARMAPPA
BASAPPA.

SECOND appeal from the decision of T. Walker, District Judge of Belgaum, confirming the decree of E. F. Rego, Subordinate Judge of Saundatti.

Suit for declaration and injunction.

The plaintiffs who were members of a community called Halgars or Devangs of the village of Deshnur sued the defendants alleging that they had built a temple at Deshnur and dedicated it to the Goddess Banshankari, that they had constructed a car for procession to neighbouring temples, that in the year 1904 they had applied to the District Magistrate for the necessary permission and that the defendants having opposed the application, the Magistrate referred the plaintiffs to a Civil Court. The plaintiffs, therefore, prayed for a declaration of their right to march in procession with the car along the road which passed through two gates called the Mulla Agashi and Durga Agashi and for an injunction restraining the defendants from interfering with the plaintiffs' right.

The defendants, who were members of the Lingayat community, answered *inter alia* that the suit was not maintainable in a Civil Court, that the plaintiffs had no right to move in procession along the road mentioned in the plaint and that the plaintiffs had built the temple and constructed the car simply to annoy the defendants who had dwelling houses on both sides of the said road.

The Subordinate Judge found that the road in dispute was public, that the defendants had a right to object to the plaintiffs' passing in procession on the road and that the suit must fail as the plaintiffs had not proved any special damage to them. He, therefore, dismissed the suit.

On appeal by the plaintiffs the District Judge was of opinion that on the merits the plaintiffs were entitled to succeed but relying on the decisions in *Satku valad Kadir Sausare v. Ibrahim Aga valad Mirza Aga*⁽¹⁾ and *Kazi Sujardin v. Madhavadas*⁽²⁾, he confirmed the decree on the ground that without proving special damage the plaintiffs could not succeed.

(1) (1877) 2 Bom. 457.

(2) (1893) 18 Bom. 693.

Weldon with *N. A. Shivesharkar* for the appellants (plaintiffs).

G. S. Mulgaumkar for the respondents (defendants).

SCOTT C J.: In this case the plaintiffs sue on behalf of themselves and of other members of a religious community at Deshnur to have a declaration of their right of marching in procession with a car along a particular public road to certain temples, and for an injunction restraining the defendants from interfering with the plaintiffs.

The suit arises out of an application made by members of the plaintiffs' community to the District Magistrate under the local Police Rules for permission to hold the procession and to march with the car along the road. The Magistrate not being convinced of their legal right so to use the public road referred them to a Civil Court for a declaration of that right.

The members of another religious community who occupy land abutting upon the road at a point where the width of the roadway is defined by two gates called Mulla Agashi and Durga Agashi, have put in a written statement denying the right of the plaintiffs to march along the road.

In the first Court it was found that the road was a public road, but it was held the plaintiffs' suit must fail as the road being public the plaintiffs could not sue unless special damage were shown and proved, and reference was made to *Satku valad Kadir Sausare v. Ibrahim Aga valad Mirza Aga*⁽¹⁾ and *Kazi Sujandin v. Madhavdas*⁽²⁾ in support of that decision. The suit was, therefore, dismissed and that decree was affirmed by the District Judge.

In appeal before us it was contended for the respondents that the plaintiffs wished to conduct along the road a car which was too large to pass through what was properly speaking the public road as defined by the space between the two gates which we have already referred to. We, therefore, remanded the case for a finding as to whether the car of the plaintiffs could pass through the two gates. The lower Court found that it could pass. It was then contended by the respondents that the car which had been submitted for measurement to the lower Court on this

(1) (1877) 2 Bom. 457.

(2) (1893) 18 Bom. 693.

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issue was not the car which the plaintiffs had originally wished to conduct in procession. We then referred that question to the lower Court and it was held that the car was the same car. The question, therefore, is whether the plaintiffs have a right to conduct in religious procession a car which is not too wide to pass along the public road.

There has been no obstruction of their right but the defendants in consequence of the course taken by the District Magistrate have denied the right claimed by the plaintiffs.

The suit is not for the removal of a public nuisance but for a declaration of the right of an individual community to use the public road. It is, therefore, a suit which raises the same question as that which was the subject of the decision in *Sadgopachariar v. A. Rama Rao*⁽¹⁾, in which the Court held that the correct view is that every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege. That case was appealed to the Privy Council and their Lordships of the Judicial Committee held that the decision of the lower Court was perfectly right that all members of the public have equal rights in public roads.

We, therefore, allow the appeal, reverse the decree of the lower Court and declare that the plaintiffs have a right to march in procession with their car along the public road referred to in the plaint and we pass an injunction restraining the defendants from interfering with the plaintiffs in the exercise of that right.

Although we have decided the question of civil right and granted an injunction in the terms prayed for, it must not be supposed that by so doing we intend in any way to fetter the discretion of the District Magistrate in passing such orders as he may be entitled to pass with reference to the procession under the Police Act Rules or any other relevant rules for the time being in force.

The respondents must pay the costs throughout.

Decree reversed.

G. B. R.

(1) (1902) 26 Mad. 376.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

TRIMBAK RAMKRISHNA RANADE (ORIGINAL PLAINTIFF), APPELLANT,
v. HARI LAXMAN RANADE AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1910.

July 1.

Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115.

A decree was adjusted outside the Court. No notice was given to the Court of the adjustment; and its sanction was not taken under section 258 of the Civil Procedure Code of 1882. The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that the adjustment not having been certified to the Court, it could not recognise it as valid but was bound to execute the decree. The Subordinate Judge overruled the contention holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act, 1872.

Held, that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of section 258 of the Civil Procedure Code, 1882.

There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 258 enacts a special law for a special purpose whereas section 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law.

Per CHANDAVARKAR, J.—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law.

Per HEATON, J.—The purpose of section 258 of the Civil Procedure Code, 1882, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree.

* F. A. No. 215 of 1908.

1910.

TRIMBAK
RAMKRISHNA
v.
HARI
LAXMAN.

APPEAL from the decision of M. V. Kathawate, First Class Subordinate Judge of Ahmednagar.

Proceedings in execution.

The decree, of which the execution was sought, was passed in 1893 and was confirmed in appeal in 1895. It directed partition of property between the plaintiff and the defendants, who were members of a joint Hindu family. The plaintiff was, under the decree, awarded annually a 1/13th share of the income of the family property. It was also directed that the parties should pay in equal shares the debts due by the family to outsiders.

In 1899, the parties entered into an arrangement, whereby the plaintiff relinquished his share in the family property to the defendants, and the defendants undertook to pay plaintiff's share in the family debts and also to pay to the plaintiff Rs. 125 every year for his maintenance, and Rs. 100 to his daughter. After the arrangement, the plaintiff continued to receive payments from the defendants. The Court was not informed of the arrangement, nor was its sanction obtained under section 258 of the Civil Procedure Code, 1882.

The plaintiff applied to execute the decree. The defendants contended that the arrangement which was acted upon by the plaintiff barred the execution. The plaintiff replied that the deed evidencing the arrangement was taken from him under coercion and undue influence; but he led no evidence to prove his allegation.

The Subordinate Judge found that the plaintiff had acted under the arrangement and was receiving thereunder payments from the defendants, who had also to liquidate a portion of the plaintiff's share in the family debts. He rejected the application for execution on the following grounds :—

"It seems to me that the plaintiff is estopped by his conduct from repudiating it. And he cannot now execute the decree. Section 258 prevents the executing Court from recognising payments or adjustments not certified to it and not sanctioned by it. It does not affect the law of estoppel as laid down by section 115 of the Evidence Act."

The plaintiff appealed to the High Court.

G. K. Dandekar for the appellant:—A decree-holder has to certify adjustment of a decree to the Court; but if he fails to do so, it is equally open to the judgment-debtor to move the Court. If, notwithstanding this, the judgment-debtor continues making payments which are not certified to the Court, the decree-holder is not thereby estopped from executing the decree. Section 115 of the Indian Evidence Act does not apply here; it is, at the most, a rule of evidence and nothing more.

S. K. Sane and *S. K. Godbole* for the respondents:—The plaintiff has in the execution proceedings admitted to have received certain payments from the defendants. These payments should, in any event, be credited in defendants' favour. See *Gopal Das v. Ganga Ram*.⁽¹⁾

CHANDAVARKAR, J.:—The *darkhast*, in respect of which this appeal is preferred, was presented for the execution of a decree for partition dated the 4th of July 1893. By that decree the appellant was awarded annually a 1/13th share of the income of the property belonging to him and his co-parceners, and it was also declared that they should pay in equal shares the debts due from them, as members of a joint Hindu family, to outsiders.

By the present *darkhast* the appellant sought, in execution of the decree, for his share of the income due for 13 years immediately preceding the *darkhast*. He also asked the Court to determine his share of the debts and to deduct it from his share of the income awardable under the *darkhast*.

The application for execution was opposed by the respondents on the ground that the appellant had in November 1899 by a deed relinquished his annual share of the income awarded to him by the decree, in consideration of receiving from the respondent Vishnu, Rs. 125 a year as maintenance.

The appellant admitted execution of the deed but pleaded that he had executed it under coercion. He led no evidence, however, in the lower Court to substantiate that defence. The Subordinate Judge held coercion not proved.

(1) (1888) All. W. N. 115.

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But it was contended before him by the appellant that, as the arrangement under the deed was pleaded as an adjustment and satisfaction of the decree outside the Court, and had not been certified to it as required by section 258 of the Code of Civil Procedure (Act XIV of 1882), the Court could not recognise it as valid but was bound to execute the decree.

The Subordinate Judge overruled the contention, holding that, as the appellant had, after executing the deed, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act.

This view of the Subordinate Judge gives the go-by to the plain language of the last paragraph of section 258 of Act XIV of 1882, which was in force at the time of this *darkhast*. It says that a Court which is asked to execute a decree for money shall not recognise for the purposes of execution any adjustment of it, whole or partial, or any payment, made outside the Court and not certified to it as required in the preceding part of the section. When the law directs that such adjustment or payment "shall not be recognised" for the purposes of execution, it means that the adjustment or payment, as the case may be, should be treated as an invalid or void transaction, so far as the executing Court is concerned. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 258 of Act XIV of 1882 enacts a special law for a special purpose, whereas section 115 of the Indian Evidence Act relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law. As held by the Privy Council in *Gokul Mandar v. Pudmanund Singh*⁽¹⁾, "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction."

The Subordinate Judge has disallowed the *darkhast* also on the ground that the appellant is not entitled to seek execution in respect of his share of the income before paying his share of

(1) (1902) L. R. 29 I. A., 196 at p. 202.

the debts due to creditors by both the appellant and the respondents as co-parceners in a joint Hindu family. But the decree does not make the payment by the appellant of his share of the debts a condition precedent to his right to receive his share of the income. The decree merely declares by way of an independent provision that the debts shall be paid equally by the co-parceners.

This is conceded by the respondents' pleader before us.

Upon these grounds the order in execution appealed from must be reversed and the *darkhast* remitted to the lower Court for fresh hearing and disposal.

In dealing with the *darkhast* it will be competent for the Subordinate Judge to consider whether, apart from the appellant's right to execute the decree in spite of his deed, his conduct in seeking execution has been fraudulent so as to render him liable to a criminal prosecution. Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the Criminal Law.

It will also be competent for the Subordinate Judge, in dealing with the *darkhast*, to consider whether under section 258 of Act XIV of 1882, the respondents' plea of adjustment outside the Court, put in as a defence to the *darkhast*, can be treated as notice, to the Court, of the adjustment, satisfying the provisions of the section regarding certification, so as to warrant the Court in holding that the decree, having been wholly satisfied, according to law, is no longer capable of execution. On this point I express no opinion.

Costs of the *darkhast* hitherto incurred in the lower Court and here to abide the result.

HEATON, J.:—I think that this is a matter which is substantially disposed of on a preliminary point, and wrongly disposed of, and therefore it must be remanded to the lower Court to be disposed of on its merits.

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Curiously enough, I say curiously, because after hearing what this matter is about, it so strikes me; no one concerned appears to doubt that we are dealing with a thing which is an adjustment of a decree. It seems to me that the question arises at the very outset whether this is an adjustment of a decree at all; or whether it is a transfer of a right acquired under a decree, which is quite a different thing. If it is the latter no question under section 258 of the old Code of Civil Procedure arises at all.

However, it has been assumed that the matter is an adjustment of a decree and that we are concerned with section 258. The lower Court has taken this view and has come to the conclusion that section 258 prevents the executing Court from recognising the adjustment in this case; but has decided, notwithstanding, that the plaintiff is estopped from seeking execution of the decree. On this point I concur with my learned colleague that there is not any estoppel.

Therefore, we are left to deal with the matter as an adjustment of the decree and to enquire what is the effect of section 258.

In my opinion section 258 of the Code of Civil Procedure of 1882 provided or intended to provide that the Court executing a decree should record as certified any payment or adjustment of the decree certified by the decree-holder or of which information and satisfactory proof were given by the judgment-debtor. That section laid down a special procedure for the case in which the judgment-debtor appeared as an applicant desiring that a payment or adjustment should be recorded as certified. The law also, in the Limitation Act, provides a period within which this special procedure may be followed.

In fact however that is not the only way in which a judgment-debtor informs the Court of a payment or adjustment. He seldom adopts the special procedure provided by section 258, but more often, as in this case, when the decree-holder has applied for execution and the judgment-debtor has received notice of the application, he pleads, in answer, a payment or adjustment. In the case before us, the judgment-debtor

asserts an adjustment of the decree and the decree-holder denies it; were the law to follow its usual course, the Court would enquire and decide whether that adjustment is proved and if it found the adjustment to be proved, would treat it so far as it went as an answer to the decree-holder's claim. #

This would be in consonance with the whole spirit of our Code and with the express provisions of section 244.

It was however necessary, or at least desirable, to provide for the particular case in which a judgment-debtor should appear, not as an opponent contesting a claim in execution, but of his own initiative as an applicant seeking to establish a payment or adjustment of the decree. Section 258 deals only with this particular case and with payments &c. certified by the decree-holder.

It is however supposed that the Court is debarred from recognising in any way any payment or adjustment unless it is certified by the decree-holder or proved by the judgment-debtor in accordance with the special procedure provided by section 258. To so suppose is to run counter to the provisions of section 244 which provide that the Court executing the decree shall determine any question between the parties relating to the discharge or satisfaction of the decree, and if what is supposed to be the effect of the law be in truth its effect, it leads to a very singular result; for it means that a decree-holder may fraudulently apply to execute a decree twice over; and the Court is prohibited from enquiring whether there is or is not a fraud; and this in spite of the fact that the decree-holder seeks to debar the Court from enquiring into the fraud, by the device of refusing to do what the law says he must do.

If that be the effect of the law, then all I have to say is that the law intends the Court to be used, in this kind of matter, not as an instrument of justice but as an aid to fraud. And, as experience has shown, this is the very effect, where the law is understood to mean, what I am contending it does not and cannot mean.

It is to me abundantly clear that the legislature never intended such a result as an encouragement of fraud. Do the

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words of the law compel it? I think not; though section 258 is doubtless worded in such a way as to invite misunderstanding. The final clause of section 258 runs thus: "Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by any Court executing the decree."

The purpose of section 258 is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. When an application for execution is presented, the Court enquires from its own records what has been previously done towards satisfaction. What it does not find on its own records it does not recognise: in this sense, that it at the outset assumes that what is not recorded as paid or adjusted, still remains unpaid or unadjusted. But it is still open to the judgment-debtor to assert and prove that what the decree-holder claims under the decree is not due, having been paid or adjusted; and it is still incumbent on the Court to go into the matter, if a contest on the point is raised. To state the result briefly, the final clause of section 258 raises a presumption, but does not limit the jurisdiction of the Court. This result appears to me to be inevitable if section 258 be read not by itself as an isolated enactment containing a complete statement of the law on the matter it deals with, but as a part of a whole and with reference to its place in the scheme of the Code and its relation to other parts of the scheme.

I am aware that the views, which I have just expressed, are not those which are commonly held. At the same time I am not sure that the argument stated in that form has ever been dealt with in any of the decisions which are contained in the Bombay Series of the Law Reports; and if that be so, seeing that the question does directly arise in this case, I think it may well be considered in the Court, which is to deal with this matter, and I should both be interested and pleased to see the case, if again it comes before the High Court, argued on the lines I have indicated. I have gone perhaps out of my way to express this opinion; but it is a matter which nearly affects the reputation of our Courts, and very closely affects the administration of justice; for

to read the law, as it often is read, is, it seems to me, to reverse the principles of justice, and to convert the instruments of justice into instruments of fraud.

Order reversed.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr Justice Heaton.

CECIL GRAY, THE SECRETARY AND A MEMBER OF THE WESTERN INDIA TURF CLUB (ORIGINAL PLAINTIFF), APPELLANT, v. THE CANTONMENT COMMITTEE OF POONA (ORIGINAL DEFENDANT), RESPONDENT.*

1910.

June 28.

Civil Procedure Code (Act V of 1908), sections 2 (17), 80—Public officer—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889)—Section 80 applies to actions ex delicto and not to actions ex contractu.

A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a "public officer" within the meaning of section 2, clause (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, the notice prescribed by section 80 of the Code must be given.

The notice contemplated by section 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions *ex contractu*.

Rajmal v. Hanmant (1) considered.

APPEAL from the decision of C. Roper, District Judge of Poona.

Cecil Gray was the Secretary and a member of an unincorporated association styled the Western India Turf Club. He sued on behalf of himself and all other members of the Club.

Under a lease dated the 16th February 1907, made between the Secretary of State for India and the Club, the latter occupied certain lands and buildings in the Poona Cantonment on a rental of Rs. 1,200 per annum.

* First Appeal No. 9 of 1910.

(1) (1895) 20 Bom. 697.

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The defendants, the Cantonment Committee of Poona, were a body corporate constituted under the Indian Cantonments Act (XIII of 1889), having the control and management of the Poona Cantonment Fund. The Poona Cantonment Magistrate was the executive officer of the Committee.

The Governor in Council of Bombay imposed, under section 17, sub-section 1 of the Cantonments Act, 1889, a general rate of 4 per cent. per annum of the annual value of houses, buildings and lands within the Cantonment of Poona. The rate was made payable to the Cantonment Magistrate and formed a part of the Cantonment Fund.

The annual value of the Club's lands and buildings was for the purposes of the rate fixed at Rs. 5,038 for the years 1907 and 1908, and the rate amounted to Rs. 201-8-4. The Club did pay the sum of Rs. 100-12-2 as rate for the half-year ending the 31st March 1909. But on the 8th October 1909 the Cantonment Magistrate by a notice to the Club claimed to assess it at the sum of Rs. 9,840 per annum being 4 per cent. on an annual gross income of Rs. 2,46,000.

On the 28th November 1908, the Club paid under protest the sum of Rs. 4,819-3-10, the additional rate for the half-year ending the 31st March 1909, and informed the Cantonment Magistrate that the Club intended to appeal against his assessment to the Cantonment Committee. The appeal was made with the result that the assessment at Rs. 4,819-3-10 was brought down to Rs. 4,671. The Club further paid under protest another sum of Rs. 4,772-1-3 for the assessment for the half-year ending the 30th September 1909.

The Club, through the plaintiff, filed a suit for an injunction restraining the defendants from recovering from the Club the enhanced assessment, and for recovering the amount of assessment that was paid in excess.

The defendants contended *inter alia* that the suit was bad owing to want of notice provided for in section 80 of the Civil Procedure Code, 1908.

The District Judge tried as preliminary the issue whether the suit was bad for notice under section 80 of the Civil Procedure

Code, 1908, and found it in favour of the defendants on the following grounds:—

The preliminary issue thus raised has been argued and I find that notice was necessary. The provisions of the Cantonments Act, 1889, make it clear in my opinion that the members of the Cantonment Committee are in that capacity public officers, as that term is employed in section 80 of the Civil Procedure Code and defined in section 2 (17) (g) of the same Code. The learned Counsel for plaintiffs contends that a corporate body, such as the defendants, cannot come under the term "public officer" who must be an individual. Having regard to section 3 (39) of Act X of 1897 (General Clauses Act) and to section 2 (17) (g), Civil Procedure Code, also to sections 21 and 23 of the Cantonments Act, 1889, I think that every member of the Cantonment Committee is a public officer and so also the Committee as a body. The suit might and would properly have been brought against the Secretary of the Committee as its representative officer and in that event he would certainly come under the definition of a public officer. On the same reasoning the Cantonment Committee, which is the Cantonment authority according to the Act of 1889, is constituted of public officers in so far as they act on the said Committee. Plaintiffs' Counsel raises a second objection against the defendants' plea that notice under section 80 is necessary. It is this. The suit, he contends, is brought on a contract or at least on a quasi-contract, and is not based on tort. To such a suit section 80 is said not to apply. It may be conceded that there are authorities laying down that "ex contractu" suits are not covered by section 80, but I am of opinion that the suit is clearly based on a tort and not on a contract or even a quasi-contract. It is urged for plaintiffs that, when they paid the assessment under protest, a contractual relation arose between them and defendants. This argument is ingenious but it cannot conceal the patent fact that the suit is primarily based on an allegation that defendants in their official capacity wrongly levied certain assessments and to such a case I think section 80 has the clearest application. On these grounds I find that the suit is bad for want of notice under section 80 of the Civil Procedure Code and I accordingly dismiss it with all costs on plaintiffs. I omitted to state that I am to some extent confirmed in the above view of the meaning of the expression "public officer" by a case in this Court Civil Suit No. 63 of 1887, where an action was instituted by private persons against the Cantonment Magistrate in his capacity as Secretary of the Cantonment Committee in respect of a title to certain property in the Poona Cantonment. The plaintiff then served a preliminary notice under section 424 of the late Civil Procedure Code upon the Cantonment Magistrate and subsequently the Secretary of State was joined as a co-defendant. The cause of action in the present suit is at least somewhat similar and the fact that the suit is brought against the Committee and not against the Secretary alone cannot, I think, exempt the plaintiffs from the obligation to serve a preliminary notice.

The plaintiff appealed to the High Court.

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Shortt, instructed by *Craigie, Blunt and Caroe*, for the appellant:—The suit has been brought against the Cantonment Committee of Poona. The Cantonment Committee is nowhere specifically mentioned as a corporation in the Cantonments Act (XIII of 1889); but it is treated as a corporation, see *The Cantonment Committee, Poona, v. Baijorji Bamanji* ⁽¹⁾.

A corporation is not included in the term “public officer” as defined by section 2, clause 17 of the Civil Procedure Code, 1908. The term “public officer” there means “a person falling under any of the following descriptions”; and the descriptions that follow show that only individual officers are contemplated. A corporation cannot be included within it. The General Clauses Act (X of 1897) no doubt says (section 3, clause 39) that a person shall include “any company or association or body of individuals, whether incorporated or not”; but that description applies only if there is nothing “repugnant in the subject or context.” There is the repugnancy in the Civil Procedure Code where the term “person” seems to denote some person who has some one or other in authority over him. The term has to be construed in conformity with the object of the statute in which it appears. See *The Pharmaceutical Society v. The London and Provincial Supply Association, Limited* ⁽²⁾.

Next section 80 of the Civil Procedure Code, 1908, applies only to actions in tort. It has no application to actions in contract. The claim in the present case arises *ex contractu* or *quasi ex contractu*; and it is only in the alternative that a relief in tort is prayed for. We paid the money to the defendants under protest and in order to avail ourselves of the right to appeal to the Committee. The object of the suit is to recover the money which the defendants had and received. See *Rajmal v. Hanmant* ⁽³⁾.

The Government Pleader for the defendants, was not called upon.

⁽¹⁾ (1889) 14 Bom. 286. ⁽²⁾ (1880) 5 App. cas. 857.

⁽³⁾ (1895) 20 Bom. 697.

CHANDAVARKAR, J. :—This Court has held in *The Cantonment Committee, Poona v. Barjorji Bamanji*,⁽¹⁾ relied upon by Mr Shortt in his able and careful argument in support of this appeal, that a Cantonment Committee, formed under rules framed under the Indian Cantonments Act (XIII of 1889), is a *quasi* body corporate. It is unnecessary to express any opinion on the correctness of that decision, because the question before us is whether, for the purposes of section 80 of the Code of Civil Procedure, a Cantonment Committee is a "public officer" as defined in section 2, clause (17) of the Code.

Under that section, the expression "public officer" means (*inter alia*) "a person", who is an "officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of Government." A Cantonment Committee is, according to the rules made under Act XIII of 1889, "a Cantonment authority," which is charged with the management of a fund called "the Cantonment Fund". That fund is vested in His Majesty by the provisions of section 13 of the Act, and its management by the Committee is made, by the same section, subject to the control of the Local Government.

The Committee is, therefore, an artificial person formed by the statute for the purposes of Cantonment administration.

But it is contended that the definition of "public officer" in the Code contemplates an individual, not a body composed of individuals, of the description mentioned in each of the clauses of section 2. A "public officer" means, in the first place, "a person", and the word "person", under the General Clauses Act (X of 1897), includes "any body or association of individuals, whether incorporated or not." Such a body, discharging, according to law, any of the functions, mentioned in the clauses of section 2 of the Code of Civil Procedure, falls, in our opinion, within the definition of "public officer".

As pointed out in some of the cases decided on the construction of section 424 of the old Code of Civil Procedure (Act XIV of 1882), which is reproduced as section 80 in the present Code, the object of the section is to give a public officer, acting or pur-

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porting to act in the execution of his public duty, an opportunity of making reparation for any damage which he may have caused in such execution without being sued in a Court. The right to notice, as a condition precedent to a suit, is given to the officer concerned in the interests of the public treasury, out of which the money must come for repairing the damage. This consideration applies to a Cantonment Committee, managing a Cantonment Fund vested in His Majesty, as much as to any public officer similarly situated.

We think, therefore, that a Cantonment Committee such as we have here is a "public officer" within the meaning of section 2 of the Code of Civil Procedure.

It is argued, however, that no notice under section 80 of the Code was necessary for the maintenance of this action against the Committee, because it arose not out of a tort but out of a contract; and *Rajmal Manikchand v. Hanmant Anyaba*⁽¹⁾ is relied upon.

The plaint and the pleadings clearly show that the cause of action complained of by the appellant is one sounding in tort. It is alleged that, under cover of authority given to it by the Cantonments Act and the rules framed under it, the respondent Committee has illegally imposed a rate upon the appellant. On the strength of that allegation, the appellant seeks the refund of a certain amount, which, he states, he deposited with the Committee "under protest" to meet its illegal demand. It is contended that the moment the appellant paid the money under protest, the Committee held it as money had and received for the appellant's use, and became bound to restore it, if the levy of the rate was illegal.

Chapter V of the Indian Contract Act, by which this argument is sought to be supported, deals with "certain obligations resembling those created by contract", not with those arising from a contract itself, which presupposes a legal relation brought about between parties by their free volition in the form of proposal and assent. The principle of *Rajmal Manikchand v. Hanmant*

(1) (1895) 20 Bom. 617.

Angaba does not apply and was not intended to apply to the former kind of obligations. It would be straining the language of section 80 of the Code of Civil Procedure beyond legitimate limits and defeating its object, if we were to apply that principle to actions sounding substantially in tort, merely because by operation of law those actions, for certain purposes, are treated as actions *ex contractu*.

On these grounds the decree in appeal must be confirmed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

CHINTAMAN VYANKATRAO GHADGE (ORIGINAL PLAINTIFF), APPELLANT, v. RAMCHANDRA VYANKATRAO GHADGE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS *

1910.

July 25.

Limitation Act (XV of 1877), sections 5 and 7—Application to file an appeal in formâ pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), section 11.

A suit filed in *formâ pauperis* was decided on the 10th February 1908. An application for leave to appeal in *formâ pauperis* was presented to the High Court on the 13th April 1908, but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *formâ pauperis* must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it.

Held, overruling the contention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly

* First Appeal No. 46 of 1909.

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within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period

The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

APPEAL from the decision of V. V. Tilak, First Class Subordinate Judge at Satara.

Suit for declaration and possession of certain property.

The property in dispute belonged to one Vyankatrao, who died on the 4th June 1905. Some time before his death, he had made a will, dated the 26th May 1905, whereby he had bequeathed all his property in favour of Ramchandra (defendant No. 1) who was his *dasiputra* (a son by a mistress).

The plaintiff alleged that on the 31st May 1905, Vyankatrao had revoked the will and adopted him as his son.

The defendant No. 1 applied to the District Court for probate of the will. The plaintiff objected to the grant on the grounds that the will was revoked and he was adopted by Vyankatrao. The District Court granted probate holding that the will was genuine and that the adoption was doubtful.

The plaintiff next filed a suit in *forma pauperis* to have it declared that he was the adopted son of Vyankatrao and to recover possession of property belonging to Vyankatrao from defendant No. 1.

The defendant No. 1 pleaded *res judicata* on the ground that the plaintiff had failed to establish his claim in the probate proceedings. The defendants Nos. 2 and 3 claimed under defendant No. 1.

The Subordinate Judge dismissed the plaintiff's claim on the 10th February 1908. He held that it was barred by *res judicata* on the following grounds:—

“Having regard to sections 55 and 83 of the Probate and Administration Act, 1881, I am of opinion that grant of probate in a contentious case is not in the nature of a summary proceeding which can be contested in a regular suit in a Civil Court.

Plaintiff's remedy seems to be to apply for a revocation or annulment of the grant under section 50 of the Act. I. L. R. 4 Cal. 360. A refusal to grant probate does not operate as a judgment *in rem* but the grant of a probate does: I. L. R. 21 Bom 563."

On the 13th April 1908, the Plaintiff presented to the High Court an application for leave to appeal in *forma pauperis* from the decree passed by the Subordinate Judge. The application was dismissed as having been presented beyond the time allowed by law.

The plaintiff, who was a minor, then applied for excuse of delay caused in presenting the aforesaid application. It was heard *ex parte* and granted by the Chief Justice on the 2nd of October 1908. But subsequently it was brought to his Lordship's notice that he had no jurisdiction to excuse the delay; the former order was thereupon cancelled on the 20th of November 1908.

An appeal against this last mentioned order was preferred under the Letters Patent. It was allowed by Chandavarkar and Heaton, JJ., on the 26th February 1909.

The original appeal was placed for final disposal.

B. N. Bhajekar for the appellant.

K. H. Kelkar for the respondents

CHANDAVARKAR, J.:—This appeal was filed at first in the form of an application for leave to appeal in *forma pauperis* from the decree passed on the 10th of February 1908 by the Subordinate Judge, First Class, at Satara, in Civil Suit No. 354 of 1907. The application, presented on the 13th of April 1908, was beyond time, having been made more than 30 days after the period prescribed by the Limitation Act, and the appellant, a minor, by his guardian prayed that the delay might be excused. The application for the excusing of delay came on for *ex parte* hearing before a Division Court on the 2nd of October 1908 and it was allowed. But it having been brought to the Court's notice that it had no jurisdiction to excuse delay, it cancelled the order on that ground on the 20th of November 1908. An appeal against that order, presented under the Letters Patent, was allowed on the ground that, the applicant being a minor, section 7 of the Limitation Act of 1877 applied and the case was

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governed by the principle of the Privy Council ruling in *Mussumat Phoolbas Koonwar v. Lalla Jogeshur Sahoy*⁽¹⁾. Leave to appeal in *forma pauperis* was granted.

Mr. Kelkar, appearing for the respondents, argues that an application for permission to appeal in *forma pauperis* must be treated as an appeal, and that, if it is so treated, section 5, and not section 7 of the Limitation Act, must apply here. Whether we treat the application as falling under section 5 or under section 7, the result is the same. If it falls under section 5 and is an appeal, as contended by Mr. Kelkar, then, under the second paragraph of that section, which applies to appeals, the Court has jurisdiction to excuse delay.

If, on the other hand, it is treated as an application and falls under section 7 of the Limitation Act, it is clearly within time and there is no need of excusing delay, because the section provides that a minor can apply after he has attained the age of majority within a certain period prescribed.

Dealing with the appeal on the merits, the suit was brought to recover possession on the ground that the plaintiff was the adopted son of one Vyankatrao. The defendant resisted the claim upon the ground that Vyankatrao had left the property to him by a will; that he had proved the will and obtained probate. Issues were raised involving the question of title and of *res judicata*.

The Subordinate Judge has disposed of the case only on the ground of *res judicata*. He has held the claim barred, because, in his opinion, the grant of probate concludes the parties as to title. That is clearly an error in law. The probate "is only conclusive as to the appointment of executors and the validity and the contents of the will: Williams on Executors, p. 452, (4th Edition): and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition": *Hormusji Navroji v. Bai Dhanbaiji, Jamsetji Dosabhai*⁽²⁾. See also *Barot Parshtam*

⁽¹⁾ (1875-76) L. R. 3 I. A. 7 at p. 25.

⁽²⁾ (1887) 12 Bom. 164.

Kalu v. Bai Muli⁽¹⁾. As the suit was wrongly disposed of on a preliminary point, we reverse the decree and remand the case for disposal on the merits according to law.

All costs including those of the Court-fees of this pauper appeal, in which Government are interested, must be costs in the cause.

Decree reversed.

R. R.

(1) (1893) 18 Bom. 749.

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CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr Justice Heaton

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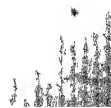
City of Bombay Municipal Act (Bombay Act III of 1888), section 305†—Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of statutes.

The owner of a large plot of land sub-divided it into a number of building sites, which he arranged on either side of a private street which was projected to run through the plot. Those building sites were let to lessees (of whom the applicant was one) for a period of thirty years; at the end of the period the lessee was to remove the building put up by him unless the lessor purchased it. Under the terms of the lease the lessee was to contribute rateably to the expenses of making, repairing, etc., all ways, roads, etc. The applicant was one of those lessees. He built a house upon one of those sites, and let it to tenants from whom he received rent. The Municipal Commissioner of Bombay issued a notice to the applicant, under section 305 of the City of Bombay Municipal

* Criminal Application for Revision No. 175 of 1910.

† The City of Bombay Municipal Act (Bombay Act III of 1888), section 305, runs as follows.—

If any private street be not levelled, metalled or paved, sewered, drained, channelled and lighted to the satisfaction of the Commissioner, he may, with the sanction of the Standing Committee, by written notice, require the owners of the several premises fronting or adjoining the said street or abutting thereon to level, metal or pave, drain and light the same in such manner as he shall direct.



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Act (Bombay Act III of 1888), calling upon him to level, metal, drain and light the public street in front of his building. The applicant failed to comply with the notice, for which he was prosecuted under section 471 of the City of Bombay Municipal Act, 1888. He contended that he was not the owner of the premises within the meaning of section 305 of the Act. The Magistrate overruled the contention and convicted him.

Held, that the mere owner of the land who had let it out under a building scheme for building purposes was not the owner of the property, because the property contemplated by section 305 necessarily embraced buildings, whether erected or to be erected; and the legislature regarded him as the owner of the premises who had the right to receive rent in respect of that property.

The word "premises" occurring in section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of immediately preceding sections of the Act. That group (sections 302—307) has reference to streets made for the use of buildings or building sites. The dominant idea running through the sections 302—304 is that of buildings either erected or projected. That is the kind of property dealt with in what has gone before section 305; and therefore that is its "*premissa*".

It is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense. One exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, where the law has attached that sense to them.

APPLICATION for revision against the conviction and sentence passed by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The Municipal Commissioner of the City of Bombay issued, under section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888), a notice to the applicant calling upon him to level, metal, drain and light the private street on which his building abutted. The applicant has built the house upon a building site which he rented from its owner one Narayan Moroji Zaoba under a lease for a period of thirty years. The applicant had to pay Rs. 14 as the annual rent for the site. At the end of the lease the applicant had to remove the building unless it was purchased by the lessor. The applicant had also agreed in the lease to pay and contribute a rateable or due proportion of the expense of making, repairing and cleaning all

ways, roads, pavements, sewers, drains, pipes, watercourses and other conveniences which might belong to or be used for the said premises.

The applicant constructed a building on the site : and let it out to tenants. He failed to comply with the notice ; for which, the Municipal Commissioner instituted proceedings against him under section 471 of the City of Bombay Municipal Act, 1888.

The Magistrate was of opinion that the applicant, as the owner of the building, was included in the expression "owners of the several premises" used in section 305 of the Act, for the word "premises" in the section meant both "land and buildings". He, therefore, convicted the applicant of a failure to comply with the requisition served upon him and sentenced him to pay a fine of one rupee.

The applicant applied to the High Court under its criminal revisional jurisdiction.

Setalvad, instructed by *Sabnis and Goregaonker*, for the applicant :—The Municipal Commissioner has power under section 305 of the City of Bombay Municipal Act, 1888, to require "the owners of the several premises" to do things mentioned in the section. The question then arises, who are the owners, and what are the premises? The term "owner" is defined in section 3, clause (m) of the Act, as meaning "the person who receives the rent of the premises or who would be entitled to receive the rent thereof if the premises were let." The word "owner" would, therefore, include the lessor *Zaoba*, who let out the building site to the applicant and who is primarily entitled to receive rent.

If persons in the position of the applicant were intended by the legislature to be reached under the section, it would have used the expression "owners or occupiers" as it has done in sections 228, 249, 251, 275, &c. See also the Calcutta Municipal Act (Bengal Act III of 1899), section 645 ; the Public Health Act, 1875 (38 & 39 Vic. c. 55), section 150.

Even if it be conceded that the term "owners" includes both the lessor *Zaoba* and the lessee (the applicant), then the Commissioner is not authorized anywhere in the Act to single

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out any one of them for the purposes of his requisition under section 305. He ought to requisition both of them.

The term "premises" is nowhere defined in the Act: and it is employed in different senses in the Act. See *The Municipality of Bombay v. Shapurji Dnshe*⁽¹⁾. Reading the sections that immediately precede section 305, it appears that the term premises means "land" and in section 305, used as it is in reference to street land, it must mean the abutting lands and nothing more.

Jardine (Acting Advocate-General), instructed by Messrs. *Crawford, Brown & Company*, for the Municipality:—It is not disputed that the applicant has constructed a building, which he has let out to tenants. He is the person who receives rent for the building, and is, therefore, its owner as defined in section 3, clause (m) of the City of Bombay Municipal Act, 1888. Even on general principles the person who receives the immediate rent is liable. It is he who is to be looked, for the benefit of enhanced rent goes to him. The lessor only gets a fixed rent for a long period of years. The applicant is not the occupier of the building for he has let it out. See *Lewis v. Arnold*⁽²⁾.

CHANDAVARKAR, J.:—The question of law before us arising on this rule is as to the meaning of the words "owners of the several premises" occurring in section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888).

The question arises under the following circumstances:—

One Zaoba parcelled out certain land belonging to him in plots for building purposes and gave each plot on lease for a fixed term (30 years). Each lessee erected on his plot a building at his own expense. The petitioner before us is one of those lessees. There is a private street adjoining the plots and it was with reference to it that the Municipal Commissioner of Bombay called upon the lessees, the petitioner included, to level, metal, drain and light the said street on the ground that they were "owners of the several premises fronting or adjoining" it within the meaning of section 305 of the Act. They having

(1) (1895) 20 Bom. 617.

(2) (1875) L. R. 10 Q. B. 245.

refused to comply with the requisition, the Commissioner filed a complaint against them in the Presidency Magistrate's Court charging them under section 471 of the Act.

The lessees contended that they were not "owners of the several premises" and that it was their lessor, the owner of the land, who was legally liable to perform the work required by the Commissioner under section 305. The Chief Presidency Magistrate overruled that contention and convicted the lessees. Hence this rule.

The City of Bombay Municipal Act defines the word "owner" but is silent as to the meaning to be attached to the word "premises", though that word occurs frequently in the Act. And, as was pointed out by Ranade, J, in *Municipality of Bombay v. Shapurji Dinsha*⁽¹⁾, the word is used in different senses in different sections, in some meaning land, in some signifying buildings, and in others including both land and buildings. We must, therefore, see in what sense the word is used in section 305 of the Act.

The popular acceptance of the word "premises", according to Sweet's Law Dictionary and Wharton's Law Lexicon, is that it includes land. The same definition is given in Johnson's Dictionary. But, although it is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense, one exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, where the law has attached that sense to them: *Her Highness Ruckmaboye v. Lulloobhoy Mottichund*⁽²⁾, and *Trimbal Gangadhar Ranade v. Bhagawandas Mulchand and others*⁽³⁾. The word "premises" has a technical meaning in law. Its strict legal meaning is "that which comes before", "the præmissa of the document or deed which includes that word". *Metropolitan Water Board v. Painé*⁽⁴⁾. As pointed out in this last decision, in Sheppard's Touchstone that is the only meaning given to the word.

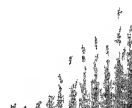
(1) (1895) 20 Bom. 617.

(2) (1851) 5 M. I. A. 234.

(3) (1898) 23 Bom. 348.

(4) (1907) L. K. B. 285 at p. 297.

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Having regard to the canon of construction as to the legal meaning of a word and to the fact that the word we have to construe occurs in a statute, I think that the word "premises" occurring in section 305 must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of the immediately preceding sections of the Act. That group consisting of sections 302 to 307 is headed "Provisions concerning private streets." The whole group has reference to streets made for the use of buildings or building sites. The dominant idea running through the sections 302 to 304 is that of buildings, either erected or projected. That is the kind of property dealt with in what has gone before section 305 and therefore that is its "præmissa".

If that view is correct—and I think it is—it follows that the mere owner of the land who has let it out under a building scheme for building purposes is not the owner of the property, because the property contemplated by the section necessarily embraces buildings, whether erected or to be erected; and the legislature regards him as the owner of the premises who has the right to receive rent in respect of that property. The lessor in the case before us receives rent under his contract only for that land; he is not entitled to rent in respect of the buildings. Once he has started his building scheme and let out his land in plots, he drops out of sight, and his lessees step in as the owners of the buildings. The land as land becomes merged in them. If no building is erected on any plot, still the plot becomes, as part of the building scheme, a building plot.

But it was contended that a more reasonable construction of the words "owners of the several premises" in section 305 was that it included both the lessor as owner of the land parcelled out for buildings, and his lessees as owners of the buildings, because the word "premises" includes both land and buildings. Such a construction of the section ignores what I have called the dominant idea of building running through the group of sections, of which section 305 is a part.

For these reasons, the conviction, in my opinion, is right and this rule must be discharged.

HEATON, J.:—I have no doubt in my own mind that the particular premises with which we are now dealing comprise the existing building and the plot on which that building stands. The lessee (in this case the applicant) is the person who receives the rent of those premises. The lessor takes the ground-rent which is something quite different from the rent of the premises. As the lessee takes the rent of the premises, he is the owner within the meaning of that word as used in section 305, as will appear from the definition of the word "owner" given in clause (m) of section 3 of the Bombay City Municipal Act III of 1888. As the lessee is the owner in this sense, I think that the notice mentioned in section 305 was correctly addressed to him, and that the Magistrate's order is right.

Rule discharged.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR v. AKBAR BADOO.*

Criminal Procedure Code (Act V of 1898), sections 162, 288—Indian Evidence Act (I of 1872), sections 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.

During the trial of an accused person, the Sessions Judge admitted into evidence and used against the accused the following statements (1) statements made by a witness to the Police implicating the accused, (2) the same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was

* Criminal Appeal No. 145 of 1910.

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examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal :—

Held, (1) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial.

(2) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself, but could not be proved and used against the accused.

The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial.

APPEAL from conviction and sentence recorded by R. E. A. Elliott, Additional Sessions Judge of Ahmedabad.

The accused Akbar Badoo and Anwar Abashi were charged with the offences of house-breaking and theft. They were tried by the Additional Sessions Judge of Ahmedabad with the aid of Assessors.

The charge was that the accused broke open the house of the complainant during his absence, and committed theft of some gold and silver ornaments belonging to the complainant.

In the course of the Police investigation that followed, one Chhagan Asharam admitted that he had sold some gold for the accused Akbar. And after some time, Chhagan admitted, in the presence of the Panch, that the accused Akbar had given to him some ornaments to sell.

Akbar Anwar and Chhagan were then arrested, when Anwar admitted before the Police that Akbar had given him some ornaments to sell, which he had sold to one Ismail. Ismail was arrested next.

All these persons were the next day sent to a Magistrate who recorded their confessions.

The charges against Akbar and Anwar were retained : and in the inquiry before the Committing Magistrate, Chhagan was examined as a witness.

The accused were committed to the Sessions Court to take their trial. In convicting them, the Sessions Judge gave the following reasons :—

All four ivory bangles were ornamented with gold and the gold has been stripped off them. Accused 1 sold the gold through Chhagan whose evidence in this Court that he sold the gold and Chudi on behalf of two brahmins Umiasankar and Nanalal has been contradicted by the Sub-Inspector, the Panch witnesses, Muljibhai Zaverbhai (Exhibit 23) and Muljibhai Naranbhai (Exhibit 24) and by the question put by accused 1 to the Sub-Inspector in cross-examination.

These facts leave no room in the minds of the Court or Assessors that Chhagan Asharam has lied in this Court and that as stated in his confession and in the lower Court he got these articles from accused 1. Ismail (Exhibit 12) admits he got 8 Vintls 2 gen 2 machlis and 4 silver studs; Lalla produced one ivory bracelet (Exhibit G) and its pair (Exhibit M) was found in the house of Jina Jibhai who has absconded.

Now we have it admitted by accused 2 that he lent his plough-share which makes a very formidable jemmy to accused 1 and that soon after accused 1 gave him the things to sell which he sold to Ismail. There is no doubt that his statement is exculpatory, but taken with the evidence of Chhagan Asharam to the Police on the 19th, to the Honorary Third Class Magistrate on the 20th December 1909 and to the First Class Magistrate, Karra, on the 13th January 1910 there can be no doubt accused 1 is guilty and accused 2 practically admits it.

The accused appealed to the High Court.

There was no appearance on behalf of the accused.

The Government Pleader appeared for the Crown.

HEATON, J. :—In this case two accused persons, Akbar Badoo and Anwar Abashi, were tried for house-breaking and theft by the Sessions Judge at Nadiad and both were convicted. Akbar has appealed and with his appeal we have to deal.

The Sessions Judge has admitted and considered, against the appellant, a good deal which is not evidence at all.

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Statements made by the witness Chhagan to the Police implicating the appellant have been admitted and used.

The same witness Chhagan's statement to the Panch and his statement as an accused person made before a Magistrate were admitted and used.

They were inadmissible for reasons I will explain later.

Then statements made by the co-accused Anwar to the Police were admitted and used. They were altogether inadmissible as evidence of the appellant's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself but could not be proved and used against the appellant. (See section 21 of the Evidence Act.)

Then there is the statement of a witness Ismail that the accused Anwar told him that he got certain things from the appellant. That statement was inadmissible against the appellant.

What remains of this part of the case after stripping it of irrelevant matter is this: Chhagan's statement to the Committing Magistrate is admissible in evidence (Criminal Procedure Code, section 288). In it Chhagan stated that certain articles were given him by appellant Akbar Badoo. Chhagan in the Sessions Court gave quite a different account of how he came by them and the Judge disbelieved that account and believed what was stated to the Committing Magistrate. But he used Chhagan's statement to the Police and his statement as an accused person and his statement to the Panch, by way of corroboration of what Chhagan had stated to the Committing Magistrate. In this he was entirely wrong. Only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act. Previous statements may be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial. The Judge did right to see the statement of Chhagan recorded by the Police if it was reduced to writing (see section 162, Criminal Procedure Code). I also think he would have been right to look at the statement made by Chhagan as an accused person, because the appellant was

undefended and consequently there was no pleader on his behalf to whom these statements could be shown. But the object of referring to such statements should have been to see whether they contained anything which could be used for the purpose of cross-examining, on behalf of the accused, the witnesses examined for the prosecution. These statements, in this case, could not be used to corroborate what Chhagan said in the Sessions Court, for they were useless for that purpose. Therefore, they should not have been admitted.

The net result, had the Law of Evidence been properly regarded, would have been this: There was Chhagan's statement to the Committing Magistrate which implicated the appellant. The Sessions Judge who heard the statement made by Chhagan in his own Court exculpating the appellant did not believe it and he found nothing favourable to the accused in the materials which could be used on his behalf, for the purpose of cross-examination.

In effect this is perhaps what the Sessions Judge really intended; but he actually adopted the illegal course of bringing irrelevant statements on to the record and using them against a prisoner under trial.

The Investigating Police Officer's deposition contains a great deal which no investigating police officer ought, in my opinion, to be allowed to depose to in examination-in-chief. I refer to the Police Officer's account of what various persons besides Chhagan said to him. It may be that what the witnesses said is admissible by way of corroboration within the terms of section 157 of the Indian Evidence Act, but to allow the Investigating Police Officer to be questioned about them in examination-in-chief, opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial. The evidence against him, in so far as it consists of the statements of witnesses, is intended to be primarily the

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statements made to the trying Court, and secondarily, in a case tried by a Court of Session, the statements made to the Committing Magistrate.

Lastly, the Judge has used against the appellant the statement made by the co-accused in the Sessions Court. That statement is not a confession. Of course the Judge was bound to hear and record what the co-accused said but it ought to have had very little, if any, effect in determining, in the mind of the Judge, whether the appellant was or was not guilty. So little is it worth, in this case, that it was really superfluous to mention it amongst the circumstances which go to establish the appellant's guilt.

There has not been a proper trial of the appellant. He has been convicted largely on the strength of statements many of which ought never to have been heard or used, and, in my opinion, we are bound to reverse the conviction and acquit the appellant.

Conviction reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

1910.

March 1.

JAINABAI AND ANOTHER, PLAINTIFFS, v. R. D. SETHNA AND OTHERS,
DEFENDANTS.*

*Mahomedan law—Wakf—Gift—Essential elements for validity—Power of
revocation—General principles—Vested remainders.*

In 1902 a Shia Mahomedan by deed conveyed certain immoveable property to himself and other trustees for himself for life and after his death for the payment of annuities to his widow and daughter and the balance to certain charities. Further clauses provided that on the death of his widow her annuity was to go to certain other charities and that on the death of his daughter a lump sum was to be given to her son. A further proviso reserved power to the settlor at any time to revoke all or any of the above trusts.

* Original Suit No. 792 of 1909.

In 1908 he revoked the trust, and executed a mortgage of the property. In 1909 he died and receivers of his estate were appointed.

His daughter then filed a suit for a declaration *inter alia* that the revocation and subsequent mortgage were invalid, and that the original trusts still subsisted.

Held, that the conveyance in 1902 was invalid.

Looked at from the stand-point of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party, and therefore subject to all the conditions of a valid gift, but *quære* whether private trusts were known to Mahomedan law.

Banoo Begum v. Mir Abed Ali(1) discussed and distinguished.

On 31st July 1902 Ebrahimbhai Hashambhai, a Khoja Mahomedan, executed a deed by which he purported to convey a certain immoveable property known as Dady Buildings, to himself and three other trustees to hold in trust to pay the net income to himself for life, and after his death annuities to his wife and daughter and certain sums to specified charities. After the death of his wife her annuity was to be set aside for the maintenance of four Khoja orphans, and after the death of his daughter a lump sum was to be given to her son. A final proviso reserved to the settlor the power at any time to revoke any or all the trusts therein mentioned. Owing to financial difficulty in June 1908 the settlor began to negotiate for a loan on the security of a mortgage of the property the subject of the above settlement. For that purpose he executed a deed of revocation, dated 18th July 1908, and nine days later, on 27th July 1908 he executed a mortgage of the property to Haji Alli Mahomed Haji Casum as security for a loan of Rs. 3,00,000. Upon the death of Ebrahimbhai Hashambhai in July 1909, one of his creditors brought an administration suit, and in that suit three receivers were appointed. On the 1st September 1909 Jainabai, the daughter of Ebrahimbhai, and her son filed the present suit against the receivers, the trustees of the settlement of (1902) and the mortgagee. The Advocate General was joined as a party defendant by reason of the charitable bequests contained in the trust settlement. The plaintiffs prayed for a declaration that Ebrahimbhai Hashambhai was not entitled to revoke the

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(1) (1907) 32 Bom. 172.

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trust settlement of 31st July 1902, that the deed of revocation and the subsequent mortgage were invalid, and that the trust settlement was still valid and subsisting, and further prayed for the appointment of new trustees.

Lowndes, with *Strangman*, Advocate General, for the plaintiffs:—

It is admitted that the settlor was governed by Shia law. Under the Shia law a power to revoke is bad. See *Amir Ali* (3rd Edition), Volume I, p. 89 : *Nasir Husain v. Sughra Begam*⁽¹⁾. Section 53 of the Transfer of Property Act does not apply to Mahomedans, and therefore does not affect the rule of Mahomedan law that a gift by a person who is not in insolvent circumstances at the time of the gift cannot be avoided by future creditors. That a life interest can be created and the subsequent interest dealt with is clear from *Banoo Begum v. Mir Abed Ali*⁽²⁾. See also *Umes Chunder Sircar v. Mussummat Zahoor Fatima*⁽³⁾. It may be taken from these cases that the Courts have modified the strict Mahomedan rule as to the invalidity of gifts '*in futuro*'. In any case, where the donor stands in *loco parentis* to the donee, as here, no transfer of possession is necessary. See *Wilson's Digest* (3rd Edition), p. 324. Finally this is a good trust under sections 5 and 6 of the Trusts Act. There was sufficient transfer of possession to complete the trust, in the opening, of a special account in the settlor's books.

Setalwad, with *Raikes*, for the first, second and third defendants:—

The transfer was not sufficient. It is as necessary in the case of trusts as in the case of gifts. See *Moosaubhai v. Yacobbhai*⁽⁴⁾. Further the settlement was in reality a wakf, containing, as it did, dedications to charity. Taking the settlement, then, as a wakf, it is void because it does not fulfil the conditions required. See *Baillie's Digest*, p. 218.

Shortt, with *Koyaji*, for the fourth defendant:—

The best possession possible, actual or constructive, ought to have been given, but this was not done. No notice was

(1) (1883) 5 All. 505.

(3) (1890) 17 I. A. 201.

(2) (1907) 82 Bom. 172.

(4) (1904) 29 Bom. 267.

given to the tenants to attain, and there was no transfer made in the books of the Municipality or Collector. See *Ismal v. Ramji*⁽¹⁾ and *Moosabhai v. Yacoobhai*⁽²⁾. Further the donor was not here in *loco parentis* to the donees as has been argued; the trustees were the donees. With regard to the alleged modification of the strict rule as to the invalidity of gifts '*in futuro*' the cases cited do not show this. In both *Umes Chunder Sircar v. Zahoor Fatima*⁽³⁾ and *Banoo Begum v. Mir Abed Ali*⁽⁴⁾ the settlement was for valuable consideration. There was no question of a voluntary gift. See also *Vahazullah v. Boyapati*⁽⁵⁾. Thus, if regarded as a private gift, it must be void, as being conditional, '*in futuro*', reserving a power to revoke (see section 126 of Transfer of Property Act) and lastly as not completed by transfer of possession. But it may be regarded as a wakf, with provisions by way of family settlement: see Wilson, p. 346, and Mulla, Art. 144. If a wakf, it is again void because of the reservation of a power to revoke, and because the settlor has reserved part of the usufruct to himself. See *Hajee Kalub Hossein v. Mussumat Mehrum Beebee*⁽⁶⁾. The Trusts Act does not apply to wakf: see section 1 of the Act. If regarded as a testamentary or quasi-testamentary document, it is also void because it violates the Mahomedan law as to wills by which a testator cannot dispose of more than a third of his estate. Even if not void as a will, it has been twice revoked, (a) by deed of revocation, (b) by execution of the mortgage. Finally under 27 Eliz., c. 4, it is void as a voluntary settlement. In whatever light the document is regarded, the settlor as a free agent has reserved a power to revoke, and has actually revoked.

Mulla, with *Davar*, for the sixth and seventh defendants, submitted to the order of the Court.

Strangman, Advocate General, in reply :—

27 Eliz., c. 4, no longer applies to India. Its place has been taken by section 53 of the Transfer of Property Act, and even this does not apply here. See section 2 (d) of the Act.

(1) (1889) 23 Bom. 682.

(2) (1904) 29 Bom. 267.

(3) (1890) 17 I. A. 201.

(4) (1907) 32 Bom. 172.

(5) (1907) 30 Mad. 519.

(6) (1872) 4 N. W. P. H. C. Rep. 155.

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BEAMAN, J.:—This is a suit by the plaintiffs to enforce an alleged gift contained in a deed of 31st July 1902. The principal defendants are the receivers of the alleged donor's estate and the mortgagee. The deed, on which the plaintiffs rely, appears to be a voluntary settlement in common form containing the usual revocation clause. The gist of the document is that the settlor, Ebrahimbhai Hashambhai, gives the properties therein mentioned to himself and other trustees in trust (1) for himself for life absolutely, (2) upon his death to his widow, Rahmatbai, an annuity of Rs. 500 a month, (3) to his daughter Jainabai, plaintiff No. 1, an annuity of Rs. 750 a month, with various bequests to charitable objects. (4) On the death of the said Rahmatbai, her annuity to be devoted to other charitable purposes and on the death of his daughter Jainabai, an event which has not yet happened, a sum of Rs. 1,50,000 to be given to his grandson Mahomedbhai, the minor plaintiff No. 2, with power to the settlor Ebrahimbhai Hashambhai to revoke all the aforesaid bounties at his pleasure. In 1908, the settlor in the exercise of his power revoked the deed of 1902 and his co-trustees thereupon reconveyed to him all the settled properties. He, then, executed the mortgage, on which the defendant No. 4 relies. The parties are Shias. Those are the undisputed facts upon which they go to trial.

The plaintiffs contend that the gift contained in the deed of 1902 was perfected by the settlor opening an account of the rents and profits in the name of the new trust, and therefore became irrevocable at any rate so far as Jainabai and Mahomedbhai are concerned, as they are within the prohibited degrees of relationship.

There are a great many answers to the claim from which I will select six of the most effective which occur to me upon a recollection of the arguments.

(1) That the deed of 1902, upon which the plaintiffs rely, is a wakf and not a deed of gift, and that being so, is void *ab initio*, by reason of the founder having retained a life interest for himself in the dedicated property.

(2) If a gift, then bad, (a) because it is a qualified and a conditional gift, so far as the plaintiffs are concerned, only capable of taking effect *in futuro*, (b) because it was not perfected by actual delivery of possession of the thing given.

(4) If a trust in the English sense within the meaning of sections 5 and 6 of the Indian Trusts Act, then necessarily revocable.

(5) If an ordinary voluntary settlement, which in form it appears to be, then again certainly revocable, as containing a revocation clause to which effect has been given. And I may add under the Indian statute law void *ab initio*, as all voluntary settlements containing general revocation clauses of that kind must apparently be under section 126 of the Transfer of Property Act.

(6) That apart from its form, the deed of 1902 is in substance and reality a testamentary disposition, the settlor's plain intention being that the objects of his bounty should only obtain it after his death: and therefore like all other wills revocable during the testator's life-time.

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I will now proceed to deal a little more in detail with each of these answers. According to all the best accredited text books on Mahomedan law, an ordinary gift *inter vivos* must be free from all pious or religious purposes. The deed of 1902 mixes up charities with private donations to the kinsmen of the settlor and it is therefore contended that read as a whole no separate gift can be isolated and cut off from the accompanying religious bequests. Considerations of this kind no doubt weighed with the Advocate General and decided him against pressing the claims of the various charities. For, it cannot seriously be argued that, in view of the life interest reserved by the settlor to himself, if this were a wakf, it would be a good and legal wakf. I am not, however, certain that the argument is so conclusive as the defendants appeared to think. It seems to me that gifts to private persons might be bestowed in the same deed which created charitable trusts and yet that the one might be quite separable and distinct from the other. When the Mahomedan lawyers laid it down that a private gift *inter vivos* to be legal and valid must be free from all

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pious or religious purposes, it is at least arguable that they did not mean that a donor might not, by one and the same act, give a part of his property for a definite private purpose involving no consideration of religion or piety and another part of the property, or even the same part of his property, assuming that the donees had exhausted their private interest in it, at the same time or thereafter in charity. Yet I feel that there is considerable force in the contention, and, having regard to the somewhat rigid and narrow views of the authors of archaic systems of law, I doubt whether, reading this document as a whole and noting how ultimately its effects are directed to the foundation of charitable endowments, a Mahomedan lawyer would not say that the whole of it was affected with the character of a wakf. If that view were adopted, it would be a short and safe cut to the conclusion I am asked to draw. I should, however, hesitate, notwithstanding the completeness and unanswerableness of this contention, once its main premiss is granted, to base my decision on this ground alone.

The second and the third answers pre-suppose that the instrument of 1902 was a deed of gift and not a wakf, and it is upon this hypothesis that the case has been most hotly contested.

As a general rule of Mahomedan law, it is, I think, unquestionable that an indispensable condition precedent to a valid gift is that it should be unqualified and *in presenti*. The books are full of prohibitions, with simple illustrations against gift *in futuro*. In the present case, if we look at what was actually intended to be done under the deed of 1902, stripped of technical phraseology, it was this. The donor said:—"I will give this property to myself for my life and after my death I will distribute it" (in the manner I have described roughly above) and at the same time he reserved to himself in explicit terms a power to revoke the whole of the gift during his own life-time. Now it is the rule of early Mahomedan law that however abominable the revocation of the gift might be, that law recognizes it before actual delivery in all cases, and after delivery saving where the gift has been to a

relative within the prohibited degrees of consanguinity. Where the gift has been to a stranger or to relatives not within the prohibited degrees, the authorities say that the gift is revocable, even after delivery of possession but only (a) with the consent of the donee, or (b) by the decree of a Judge. The first of these exceptions clearly implies a re-gift by the donee to the donor and is not strictly speaking a revocation at all. The second, however, points equally clearly to the revocability of all gifts at the suit of the donor, even after possession has been given, unless the donee is within the prohibited degrees of relationship. Like so much else in the Mahomedan law, it is not very easy to understand the principle upon which this latter rule is founded or upon which the Judge would give or withhold the relief sought. Presumably his doing so would be something more than a mere formality going as a matter of course; and would depend upon what he considered to be the equities of the parties in the particular case before him. It is not easy, indeed I doubt whether it is possible, to keep a discussion of the defendants' two answers, on the supposition that this was a gift, wholly distinct. For modern case law has confused the originally simple notions of the Mahomedan law-givers so much, both upon the indispensableness of the gift being unqualified, and *in presenti* and actual possession of the thing being given, that the two answers constantly overlap, when reference is made to the authorities. It is first, however, desirable to have a clear view of the facts. Now it cannot be denied that the two plaintiffs are related within the prohibited degrees of consanguinity, nor can it be denied that immediately after executing the deed of 1902, the settlor, who, under that deed, not only reserved to himself a complete life interest in the property but was also the only managing trustee, opened an account of the rents and profits in the name of the trust, and it is strenuously contended for the plaintiffs that this was a sufficient delivery of seisin to satisfy the requirements of the Mahomedan law. Further, that if that were so, the gift having been completed by delivery of possession and the donees being the daughter

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and grandson of the donor, it became from that moment irrevocable. This legal result, it is contended, is in no way affected by the reservation in the deed of gift of a power of revocation or the postponement of the gift to the daughter and grandson to an uncertain future time, depending (1) upon the death of the settlor, and (2) upon the death of Jainabai. In my opinion this contention is unsustainable. Looking to the clear and positive principles of the Mahomedan law, I cannot believe that any gift, which is only to take effect after the death of the donor, and during his life-time is expressly declared to be revocable by him, could ever be a valid gift. The question might have been complicated, had the donor died without revoking the contemplated gifts. But even so, I should still have been of opinion, that as declared in the instrument of 1902, the gifts to Jainabai and the minor plaintiff were illegal and invalid. Then there is the further question whether possession was actually given or whether, indeed, having regard to the nature of the gift, it could have been given. The decision of the Privy Council in *Umes Chunder Sircar v. Mussummat Zahoor Fatima*⁽¹⁾ which was a case between Sunnis, and *Banoo Begum v. Mir Abed Ali*⁽²⁾, where the parties were Shias, have gone as far, I think, as our Courts are ever likely to go in the way of stretching the rules of the Mahomedan law. The former of these cases decides that anything "like what we call in English law a vested remainder" may be the subject of gift valid according to the Mahomedan law. And our Court of Appeal in *Banoo Begum v. Mir Abed Ali*⁽³⁾, quoting that judgment with approval, applied it with the less hesitation to Shias because the Court was supplied with translations of a series of excerpts from Arabic text-books of authority which, the learned Judges thought, put beyond question the fact that the Shia law had all along recognized gifts of future and limited estates resembling what we call vested remainders. It is not for me to question the authority of these decisions which are of course binding upon me. I may, however, point out that none of the texts cited in support of the conclusions arrived at by

(1) (1890) 17 I. A. 201.

(2) (1907) 32 Bom. 172.

their lordships in *Banoo Begum's* case, as indeed a very cursory examination will show, can really be carried that length. All these texts deal with the giving of a right of residence, a life interest, or an interest for a limited period. One of them certainly speaks of a gift to a man and his descendants, but taking them altogether and in their natural contexts, it is submitted that their plain meaning ought to be confined to what was then in the contemplation of the writers, namely, a single qualified gift; qualified, that is to say, not with reference to any rights which he might have reserved to himself by way of revocation or curtailment but simply with reference to the duration of the gift in time; subject, again, to an exception in the case of gifts for residence which, while no doubt also limited in time by the life of the donee, are likewise limited in extent by the peculiar object for which the gift is expressed to be made. But none of these texts or observations to which my attention has been drawn in all the accredited Mahomedan law-books (with the exception of a single sentence in Amir Ali) can, I think, support the view that Mahomedan law-givers ever had in contemplation or intended to sanction the gift of a succession of independent and limited estates. I do not believe, speaking for myself, that any reputed Mahomedan law-book of Mahomedan lawyers contains any mention or had the faintest conception of anything so entirely artificial as the estates which our English law has created and recognized. As to the passage in Amir Ali, that is couched in the most sweeping and general terms and the learned author gives as his authority for it one of the texts quoted in *Banoo Begum's* case which I have just referred to. As a mere matter of academic argument, I may be permitted to doubt whether the most ingenious logic could reconcile the indispensableness of giving *de facto* possession *in presenti*, to the validity of a gift *inter vivos* with the gift of a remainder possibly postponed fifty years and therefore not taking effect till long after the death of the donor, being nevertheless a gift valid in Mahomedan law. These cases are indeed plainly examples of the strenuous attempts our Courts are constantly making to expand the rigid rules and principles of archaic systems of oriental law to meet the requirements of a rapidly growing, progressive,

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and developing society. That attempts of that kind are inevitable, politic, in every sense desirable, is not less clear than that endeavouring to attain their objects by thoroughly consistent and logical reasoning is attended with the very greatest difficulty, even if it be really possible. It would be very easy to substitute the most complex and artificial products of advanced civilized jurisprudence for the extremely crude and simple notions of primitive people. But so long as we profess to respect and give effect to the latter, I confess for my own part that it is beyond my power to reconcile them by any process of completely logical reasoning with all that has preceded and is implied in the former. Yet even so it is not difficult I think to distinguish cases such as those I have referred to from the present case. For, if a man gives his house to A for his life and on his death to B for his life and on his death to C, it is at least possible for the donor as between himself and A the first term in the series of estates to comply with all requirements of the Mahomedan law. He may announce his gift, A may accept it and the donor may then put A in actual possession of the property. I may, however, observe that the illustration I have given is very different from cases of Onra and Sukna mentioned in the texts upon which the judgment in *Banoo Begum* is founded. What the old law-givers had then in contemplation was nothing more than the donor divesting himself of his property in favour of the donee for the time, on the expiration of which the property would automatically revert to the donor. And this principle is not, I think, affected by extending the gift in general terms to the descendants of the first donee. The donee and his descendants are then regarded as the single object of the benefaction, the only difference being that in the natural course of events the addition of descendants would protract the duration of the first gift and postpone its reversion to the donor. Coming back to our present case it will be seen at once that it differs in one very material point. For, the first donee is the donor himself; and it is, therefore, impossible, as in the first case I put, for him to comply in any way with those conditions which the Mahomedan law makes indispensable to a valid gift. And that being so, it could only be by a fictional process identifying him in some

way with the remoter object of the bounty that the gift could ever be valid at all. This difficulty has pressed very heavily on the learned and eminent counsel who argued the plaintiff's case with so much ability. It has been contended that inasmuch as this gift took the form of a trust, the donees technically at any rate were the trustees, including the settlor himself who was the managing trustee. Therefore, it is said, the only way in which actual seisin could be given was the way which the settlor took, that is to say, by opening a fresh account of the rents and profits of the property in the name of the trust instead of in his own private name. Now, while that might serve in certain cases to surmount the initial difficulty I have been considering, it does not appear to me to touch what is the substantial and real difficulty falling partly under both the defendants' answers on this head. I mean of course that whatever the artificial legal construction of the settlor's position might be, in fact he had retained possession as he indeed intended to retain it in his own hands and for his own use as long as he lived. Further, if we are to borrow a technicality from the English law of trust to fortify this argument and that the trustees were the donees within the meaning of Mahomedan law and that one of them having assumed possession and management of the property, the gift was complete, then I do not see how we can escape from the further consequence that the donees themselves restored the gift to the original donor. If the plaintiffs seek to surmount that objection by invoking another rule of Mahomedan law, that where a person gives to one to whom he stands *in loco parentis*, his possession becomes in law the possession of the donee and the gift therefore irrevocable, the answer is again plain and conclusive. That special rule of law is only applicable in cases where the donor standing *in loco parentis* to the donee purports to give to the latter *in presenti* but himself retains the actual physical possession. I insist upon the words *in presenti* because that appears to be the very foundation of the rule. Here, it was not the intention of the donor to give this property immediately either to his wife, his daughter, or to his grandson, and it could only be where that intention synchronised with the donor retaining possession of the property given, that

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that possession converted by the intention would be regarded in law as constructively the possession of the donee. There is not, I believe, a single instance of that rule being applied where a father says, "I give my property to myself for my life and on my death to my son," for in such circumstances there can be no intention in the donor to part with the property during his life-time. The most that he can be said to surrender in such cases is the power of alienating the property, and that is not a thing of which possession can be given in any sense compatible with the principles of the Mahomedan law of gift. But these answers appear to me to be absolutely conclusive against the plaintiffs even on the assumption that the deed of 1902 was not a wakf but a deed of gift.

It was next contended that under sections 5 and 6 of the Indian Trusts Act, this was a good trust. With the utmost deference to the eminent and learned Judge who decided the case of *Moosabhai v. Yacoolbhai*⁽¹⁾, I do gravely doubt whether private trusts were known to Mahomedan law. I doubt whether, in any of the standard works upon that subject, private trusts will be found in any index. They are mentioned in Mulla's recent work but solely on the authority of *Moosabhai v. Yacoolbhai*. The point is perhaps of no great importance, for looked at from the standpoint of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party and therefore subject to all the conditions of a valid gift. But it has been argued in this case that inasmuch as the trust in the English sense does not conflict with any part of the Mahomedan law, if this is a good trust, its effect would be the same as a good gift and therefore the quality of irrevocability would attach to it. I am altogether unable to accede to this contention to which Mr. Lowndes committed himself, I must say, with some diffidence. It amounts, when analysed, to this: that while this may not be a good gift according to the Mahomedan law of gift, it is a good trust according to the English law of trust. There can be no question, however, that if we are to regard it strictly from that point of

(1) (1904) 29 Bom. 267.

view, it would like all other trusts be revocable. But then it is argued that this cannot be so because although merely valid as an English trust it has been made by Mahomedans and therefore takes on the whole the character of a Mahomedan gift, the beneficiary being within the prohibited degrees. One feature of that character is irrevocability, that is to say, that while it might be a bad gift in the eye of Mahomedan law because it was qualified, because it was *in futuro*, because possession was not given, yet it is a good trust. A good trust is revocable: a good gift to donees of a class is, amongst Mahomedans, irrevocable. This good trust would be a bad gift amongst Mahomedans but being a good trust and made by Mahomedans and the Mahomedan law having nothing to say upon such a subject, it must take effect as though it were a good and not a bad gift and so become irrevocable. That argument, however ingenious, appears to me to be thoroughly unsound. If it is only a trust because it fulfils the requirements of sections 5 and 6 of the Indian Trusts Act, then it is revocable and has been revoked. If it is anything more than that and seeking to enforce it upon that footing would bring it into conflict with any rule of the Mahomedan law which is the case here, then sections 5 and 6 of the Trusts Act have no application.

The fifth answer is that on the very face of it the deed of 1902 is a voluntary settlement in English common form. I have no doubt that it is, I have no doubt that it is something of which the early Mahomedan law-givers had not the faintest conception; therefore to provide for the legal operation and effect of which they could not possibly have made any provision. If it is no more than that, then it would of course in England be revocable since it contains the usual revocation clause. The Indian law appears to go further and under section 126 of the Transfer of Property Act it is noteworthy that all voluntary settlements containing a revocation clause appear to be *pro tanto* absolutely void.

Lastly, whatever this may be in form, for all practical purposes it really is a testamentary disposition of a part of the settlor's estate. No doubt modern ingenuity will seek ways of this kind

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of evading the rigid restrictions of the old law. But Courts will, I think, be wary against allowing Mahomedans under the guise of deeds of gifts to will away their property contrary to the provisions of their law. When a man says, "I give the whole of my property to myself for my life-time and on my death to my friend Z," were the Courts to validate such an intention whether wrapped up in the form of a trust or not, it would be lending themselves to defeat the Mahomedan law of wills. Apart from that consideration a will is of course revocable and therefore if, upon a true construction of the deed of 1902, it should appear to be in substance, whatever it may be in form, a testamentary disposition of property, it could, in the first place, take effect upon no more than one-third of the testator's estate, and in the next place, it would be open to him to revoke it at any time before his death.

These, I think, are reasons enough for my conclusion that the plaintiffs' suit fails and must be dismissed with all costs.

Suit dismissed.

Attorneys for plaintiffs:—Messrs. *Payne & Co.*

Attorneys for defendants 1, 2, 3, 6 and 7:—Messrs. *Matubhai, Jamietram and Madan.*

Attorneys for defendant 4:—Messrs. *Smetham, Byrne & Co.*

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

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November 1.

IN THE MATTER OF THE LAND ACQUISITION ACT I OF 1894.

THE GOVERNMENT OF BOMBAY, APPELLANTS, v. ESUFALI SALEBHAI, RESPONDENT.*

Land Acquisition Act (I of 1894)—"Land"—Acquisition of outstanding interests where Government owns fee-simple.

PER CHANDAVARKAR, J.:—To acquire a land [Sc. under the Land Acquisition Act] is not necessarily the same thing as to purchase the right of fee simple to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like.

* Reference No. 2 of 1906.

Appeal No. 34 of 1908.

The definition given to the word "land" in section 3 (a) of the Act is not exhaustive..... The use of the inclusive verb "includes" shows that the legislature intended to lump together in one single expression—*viz.* "land"—several things or particulars, such as the soil, the buildings on it, any charges on it, and other interests in it, all of which have a separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require.

PER BACHELOR, J. :—Government are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation, based upon the market value of the whole land, must be distributed among the claimants. In such circumstances there is no insuperable objection to adapting the procedure to the case on the footing that the outstanding interests, which are the only things to be acquired, are the only things to be paid for.

APPEAL from a reference to the High Court under section 18 of the Land Acquisition Act (I of 1894). In November 1902 Government notified their intention of acquiring, for a public purpose, a certain plot of land, with buildings on it, situate at Parel Road, and, after the usual notices had been issued and other formalities duly observed, the Collector entered upon an inquiry in December 1902. The only claimant appearing at this inquiry was Esufali Salebhai who was in possession of the land in his capacity as executor of one Salebhai Heptoola. On 14th May 1904, Government gave notice to the claimant to quit, and on 29th June the Government Solicitor set up the claim that the land belonged to Government, and that Salebhai was only a tenant by sufferance and had therefore no right to compensation except for the buildings. The inquiry proceeded, however, and the Collector on the evidence decided in favour of Government, and, after arriving at a valuation of the whole plot, awarded to the claimant compensation for the buildings alone. The claimant declined to accept the award and the Collector accordingly referred the matter to the High Court.

Macleod, J., on the reference made a slight alteration in the figures of the amount and awarded the whole sum to the claimant, on the ground that in the first place the Collector had no jurisdiction to decide the question of title as between Gov-

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ernment and the claimant, and, secondly, Government, after having once proceeded to acquisition under the Act, could not in such proceedings set up the claim of ownership. From this decision Government appealed.

Robertson, with him *Strangman*, Advocate-General, for the appellants :—

The Judge in the Court below held that he had no jurisdiction to come to any finding on the first six issues, *viz*, as to title to the land as between Government and the claimant. And yet he awarded the total compensation to the claimant, whose title to it had been disallowed by the Collector. If the Collector had no jurisdiction, then the Judge had no jurisdiction to hear the reference. But the Collector had jurisdiction. It is his duty to ascertain the interest of the claimants, and in doing so he must necessarily decide the interest of Government. The two Allahabad cases, *Imdad Ali Khan v. The Collector of Farakhabad*⁽¹⁾ and *The Crown Brewery, Mussoorie, v. The Collector of Dehra Dun*⁽²⁾, must be distinguished, they were both decided under the old Act (X of 1870). The power of the Government to levy assessment on land under City of Bombay Land Revenue Act (Bom Act II of 1876) shows they have interest in land.

Jardine, with *Selalvad*, for the respondent :—The rent due to Government on this land is a demand on it, and not an interest in it. But in any event the Act does not contemplate Government taking up land in which it is interested. Having put the Act into force, Government is estopped from making any claim to any interest. What is acquired is the land and all the interests therein: *Bombay Improvement Trust v. Jalbhoy*⁽³⁾. The Act thus cannot contemplate Government taking up its own interests, however small. Government could sell its interest to the acquiring body. In section 3 (b) the definition of "person interested" excludes Government, because Government is not interested in

(1) (1885) 7 All. 817.

(2) (1897) 19 All 339.

(3) (1909) 53 Bom. 483.

the compensation. Section 23 contemplates that the compensation shall be the whole market value of all the interests in the land. See also *Collector of Belgaum v. Bhimrao*⁽¹⁾, which is supported by *Jubbhoy's case*⁽²⁾. Section 11 (u) and (iii) clearly exclude Government, and aim at compensating the persons dispossessed. The Crown is not affected in any way by a statute unless there is express provision to that effect in the statute. *Secretary of State for India v. Mathurabhai*⁽³⁾. If Government has any claim here, it can file a suit.

Robertson in reply —

With regard to the point of estoppel, there was no suggestion of this in any of the issues. But Government is not here acquiring its own interest, it is acquiring land in which it is interested. It is suggested Government might sell its interest to the acquiring body, but suppose Government is acquiring for itself. Section 11 (iii) does not force the Collector to apportion to any person more than compensation for his particular interest. There is no need for the Crown to be expressly mentioned. See *Bell v. Municipal Commissioners for City of Madras*⁽⁴⁾.

CHANDAVARKAR, J.:—In my opinion, Macleod, J., from whose decree passed upon a reference from the Collector of Bombay, under the Land Acquisition Act, this is an appeal, has taken too narrow a view of the Act, not supported either by the language and object of its provisions or the law relating to the rights of the Crown.

The question for decision arises under the following circumstances, shortly stated.

The land in dispute having been, in the opinion of Government, required for a public purpose, a declaration to that effect was published by them, and the Collector of Bombay adopted the preliminary steps and observed the formalities, required by the Act, for the compulsory acquisition of the property. The land had buildings on it. The respondent, who claimed both the land and buildings as owner, having declined the amount

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(1) (1908) 10 Bom. L. R. 637.

(3) (1889) 14 Bom. 213.

(2) (1909) 33 Bom. 483

(4) (1902) 25 Mad. 457 at p. 495.

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of compensation offered by Government on the ground of inadequacy, the Collector commenced an inquiry into the value of the property for the purpose of determining the amount of compensation payable under the Act. In the course of the inquiry the Government Solicitor, who represented Government before the Collector, put forward their claim to the land as owners and averred that, as the respondent had held it as a tenant by mere sufferance, he was entitled to compensation in respect of the value of the buildings only. The Collector took evidence and, arriving at the conclusion that Government were owners of the land, he made an award of Rs. 41,693-2-3 as the amount of compensation payable to the respondent for the buildings. The respondent having refused to accept the award and asked for a reference to this Court, the Collector referred the matter accordingly.

Macleod, J., before whom the case came to be heard, has held that the Collector had no jurisdiction to go into and determine the question of title for the purposes of the inquiry before him; that the Act does not apply to land of which Government are, or claim to be, owners; and that, where they have begun by setting the machinery of the Act in motion for the compulsory acquisition of any land from a private individual as owner of it, they cannot plead in these proceedings their own right as owner and claim compensation in respect of it as against him. Upon this view, without going into the question of title to the land raised before him, the learned Judge has directed the whole amount of compensation, both for the land and the buildings, aggregating two lakhs of rupees and odd, to be paid to the respondent, who was claimant before the Collector.

The result of this decree is that the respondent is held not entitled to determination of his right to the land, although sections 30 and 31 of the Act distinctly contemplate that such right must be determined by the Court before the claimant can receive compensation. Further, if the construction which the learned Judge has put upon the language of the Act is correct, land of which the Crown is owner, but which is in the

occupation of a subject under a lease or the like, cannot be compulsorily acquired under the Act, however urgent, on public grounds, the need of such acquisition may be.

The result is not satisfactory from the public point of view. But if the Act, on a proper construction of its language, allows it, it cannot be helped. The learned Judge's view is supported by two decisions of the Allahabad High Court which he has cited—*Imad Ali Khan v. The Collector of Farakhabad*⁽¹⁾; *The Crown Brewery, Mussoorie, v. The Collector of Dehra Dun*⁽²⁾. These, indeed, were decisions under the old Land Acquisition Act (X of 1870); but there is no material difference in principle or language between that and the present Act. In my opinion, the language of the Act, reasonably construed, does not lend itself to the interpretation put upon it by Macleod, J.

It is to be remarked at the outset that the Land Acquisition Act was passed by the legislature for the purpose of compulsorily acquiring any land when it is required for a public purpose or for companies. The legislature has constituted the Local Government the judge of that requirement, and the Collector, agent of that Government, for the purpose of compulsory acquisition. The Allahabad decision in *Imad Ali Khan v. The Collector of Farakhabad*⁽¹⁾ proceeds upon the ground that it is a contradiction in terms to speak of the Collector as seeking acquisition of a land which he asserts is his own. But the Collector is not seeking his own: he is merely the agent of the Local Government who are constituted the statutory authority to acquire the land compulsorily. When the land has been so acquired, the land becomes, indeed, absolutely vested in the Government free of all incumbrances (section 16); but that is for devoting the land to the purpose for which its compulsory acquisition was declared necessary. Such is not the case with land of which, in ordinary parlance, it is usual to speak as land owned by Government. Legally, the Local Government own no land. The Crown is the

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⁽¹⁾ (1895) 7 All. 817.

⁽²⁾ (1937) 13 All. 339.

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owner of all State lands and property, and these are vested in the Government of India in trust for the government of the country (21 & 22 Vic., c. 106, s. 37). And the Government, under that power, can use the Crown lands for any purpose. But the Crown remains owner unless the ownership has been transferred to a subject by way of fee-simple. This difference must be borne in mind in interpreting the provisions of the Land Acquisition Act.

It is quite true that there can be no such thing as the compulsory acquisition of land, owned by and in the occupation and control of the Crown. The Land Acquisition Act cannot apply to such lands, because all Crown lands being vested in the Government, they are competent and free to devote any of those lands to a public purpose. It is a contradiction in terms to say that the Government are compulsorily acquiring that which they have already acquired otherwise, both as to title and possession.

But suppose a land owned by the Crown and vested in the Government has been parted with in such a way as to create in favour of a subject of the Crown a limited right to hold and use it for specific purposes while reserving to the Crown the ownership of the land, *i. e.*, the freehold interests in it, not merely the Crown's right to land revenue. As an instance of this kind of land ownership reference may be made to the decision of Westropp, C. J., in *The Justices of the Peace for the City of Bombay v. The G. I. P. Railway Company*⁽¹⁾. In such a case, the land with its freehold interests is not free so as to enable the Government to use it for a public purpose, unless they buy out the person who has the right to hold and use it. And if they buy, the purchase extends only to that person's right to hold and use, in fact, to his partial interest in the land, not to the ownership, because the latter is already in the Crown. Nevertheless, when the sale has taken place, the Crown "acquires" the land in the sense that it is free to use it for any purpose it likes. To acquire a land is not necessarily the same thing as to purchase the right of fee-simple

(1) (1872) 9 Bom. H. C. 217.

to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like.

The Land Acquisition Act substitutes a compulsory for a contractual acquisition of land, where it is required for a public purpose. The object is to get at the *land* for a public purpose: and the word *land* has a definition expressly given to it in the Act, which is not exhaustive, because the Act says: "The expression 'land' includes benefits to arise out of the land, and things attached to the earth, or permanently fastened to anything attached to the earth." The use of the inclusive verb "includes" shows that the legislature intended to lump together in one single expression—viz. 'land'—several things or particulars, such as the soil, the buildings on it, any charges on it, and other interests in it, all which have a separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require.

Thus, in an ordinary case, where a land in the sense of fee-simple is owned by one person, and the buildings on it are owned by another, the Collector has to enquire into the market value of the land as land having buildings on it, and in so doing he fixes the value of each separately and apportions the compensation accordingly: *Dunja Lal Seal v. Gopi Nath Khetry* ⁽¹⁾.

But it is said that the Act cannot have been intended by the legislature to apply where the Crown represented by the Government claims to be interested in the land as owner. In support of this view, Macleod, J., relies principally on sections 11, 15 and 23 of the Act, and he concludes that there is no "provision for the acquisition of anything less than permanent interests in the land, and land in the Act must mean land irrespective of any interests which have been created in it."

This conclusion is opposed to the wide meaning attached to the term "land" by the definition given in section 3 of the Act. It is true that in sections 11, 15 and 23, the word "land" appears

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at first sight as if it were used in the ordinary sense, but even on that narrow construction due and full effect can be given to the language of those sections consistently with the right of the Crown to intervene and claim its interest as owner of a land acquired for a public purpose as against a claimant.

Macleod, J.'s view, as I understand it, is that because section 11 requires the Collector to determine "the value of the land," to state in his award its area and "the amount of compensation which should be allowed for the land," and because under sections 15 and 23 the Collector and the Court are bound to determine the amount of compensation with reference to "the market value of the land," the plain intention of the legislature appears to be that what they had in view as the subject-matter of compulsory acquisition and compensation was 'land' as distinguished from any interest in it less than permanent. The fact that provision is made in the Act for the determination of the amount of compensation with reference to "land" while the Act is silent as to the acquisition of any interests less than permanent in it, has led the learned Judge to that conclusion. And in supporting his decree, the respondent's counsel has argued before us that in the case of a land of which the Crown is owner, the sections above mentioned can have no meaning and application. Of what use is it, asks the counsel, to determine the area of, and fix the compensation for such land, when the Crown, being its owner, has to pay nothing and receive nothing?

This argument would be unanswerable if it were clear that the determination of the area and of the amount of compensation was absolutely useless and irrelevant in the case of a land owned by the Crown, that, in fact, no necessity could conceivably exist or arise in the case of such lands. The necessity for such determination must, indeed, exist invariably where the land compulsorily acquired was owned by a subject of the Crown. Cases of that kind arising under the Act must, in the very nature of things, be more frequent than cases of lands owned by the Crown. Even if we assume that the legislature had those

more frequent cases in view in enacting the provisions of the Act now under discussion, it cannot be maintained that those provisions are altogether valueless and inapplicable to the rarer cases of lands owned by the Crown. Even as to these, it may be sometimes necessary to determine the area and the amount of compensation payable for the land, as distinguished from subordinate interests, as a matter of account, because the acquisition may be for a company or other body, from whose pockets the money is ultimately to come. Due and full effect is given to the sections if we have regard to these considerations. They are intended for most of the cases arising under the Act, and because in some cases they are superfluous, it does not follow that the latter were meant to be excluded from the operation of the Act.

According to Macleod, J., "*land* in the Act must mean land irrespective of any interests which have been created in it", such as the interest of a tenant from year to year or of a tenant holding for a period over a year. He says: "Take the case of a lease for ninety-nine years, fifty years of which have still to run when Government wish to acquire the land. How is the Collector to arrive at the value of the lessee's interest in the remainder of the term?" No doubt in the case of a fee-simple, the so-called tenant is and must be treated as the owner interested in the land entitled to compensation for it. So far I agree with Macleod, J. See *The Collector of Poona v. Kashinath*⁽¹⁾. But I cannot agree when he says that "in the case of lands let out for a period over a year, it is difficult to see how the Government can take action under the Land Acquisition Act if it desires to put an end to the term, unless the words 'the compensation payable for the land' in section 11 can be paraphrased into compensation for those interests in the land which are not vested in Government." Now, as a matter of law, these words have been in effect so paraphrased in cases to which private individuals, not Government, were parties and which have been decided under the Act. In *The Collector of Poona v. Kashinath*⁽¹⁾, there was a claim for compensation made by certain tenants, who held

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(1) (1886) 10 Bom 595 at p. 591.

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under an unexpired lease of nine years of the land for gardening purposes at the time of compulsory acquisition by the Collector. And it was held by this Court that "as persons interested in the land under section 3, they are entitled to share in the total compensation awarded for the fee-simple of the property." In *Fink v. The Secretary of State for India*⁽¹⁾ it was held that the term market value of land, as used in the Act, includes not only freehold interests, but also the interests of tenants, etc. In *Nurain Chandra v. The Secretary of State for India in Council*⁽²⁾, it was decided that a yearly tenant is entitled to share in the compensation under the Act as well as a tenant for periods over a year. Macleod J., appears to have been pressed by the difficulty of ascertaining the value of the interest of a lessee holding for a fixed period in the unexpired term of his lease. No guidance is given, indeed, in the Act for the valuation of such interests. The reason appears to be that the legislature, having given a general direction that the amount of compensation payable for a land shall be determined according to its market value, left the decision as to the interests subordinate to the right of ownership or fee-simple to rest upon principles which the Collector or the Court may see fit to apply in each case on grounds of law and equity. Interests in or benefits arising out of land are various, and it would have been practically impossible to mention them exhaustively and provide for each of them in the Act.

The whole question is the intention of the legislature. Did it intend by this Act to exclude from its operation lands let out by Government, without a transfer of the fee-simple? Where that intention is not expressed in explicit terms, it has to be gathered not merely from the language of some sections but by a consideration and comparison of all the sections in the Act bearing on the question for determination, and also from the purview and policy of the Act. Sections 11, 15 and 23 of the Act, on which Macleod, J., has rested his reasoning, must be read with sections 30 and 31. These distinctly contemplate that the amount of compensation determined under those sections must be

(1) (1907) 34 Cal. 599.

(2) (1900) 28 Cal. 152.

paid to the person "entitled" to it, or where there are several persons claiming, it must be apportioned among them according to their respective rights. That is the paramount intention of the Act with reference to the payment. In that respect it follows the Lands Clauses Act in England, as to which it has been held that "it is the person who is entitled to the land who ought to have the money." Per Cotton, L. J., in *In re Manor of Lowestoft*⁽¹⁾.

But it is urged that in any case the Land Acquisition Act cannot apply to the Crown, because the Crown is not mentioned in it. In *The Secretary of State for India v. Mathurabhai*⁽²⁾, there is a dictum of this Court that the rule of construction of English law, according to which the Crown is not affected by a statute, unless there are words in it to that effect, applies to India. That dictum was on the authority of the decision in *Gunpot Putaya v. The Collector of Kanara*⁽³⁾. The head-note to the report of *The Secretary of State for India v. Mathurabhai*⁽²⁾ is misleading where it says that, according to the judgment in that case, "the rule of construction, according to which the Crown is not affected by a statute unless specially named in it, applies to India." The words "specially named" are the reporter's, not of the Court. The rule of English law is that a statute does not bind the Crown, unless it is named in it expressly or by necessary implication. See the Judgment of Wills, J., in *Cooper v. Hawkins*⁽⁴⁾.

In cases arising under the Lands Clauses Act in England, it has been held that the interests of the Crown are not affected by anything in the Act: *In re Manor of Lowestoft*⁽¹⁾, but the ground of that, as explained by Baggallay, L. J., in that case, is that "you cannot by any process under the Lands Clauses Consolidation Act bring the Crown into Court as a litigant to contest any claim before the Court." But the Crown may waive its prerogative in that respect and intervene where its rights and revenue are affected and take the benefit of any particular Act, though it be not named therein. That is so "by the common

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(1) (1883) 24 Ch. D. 253, 257.

(2) (1889) 14 Bom. 213.

(3) (1875) 1 Bom. 7 at p. 9.

(4) [1904] 2 K. B. 164 at p. 168.

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law of the realm, and from time immemorial the prerogative rights of the Crown cannot be restricted by an Act of Parliament without express words," where its revenue is affected: *The Attorney-General v. Constable*⁽¹⁾. And the right of the Crown to intervene and have a trial at bar where it is actually and immediately interested in the litigation, is a branch of the Royal prerogative. [Per Wiles, J., citing Chitty's Practice in *Dixon v. Farrer*⁽²⁾.] No doubt, though the whole amount of compensation, determined in the present case under the Act, is paid to the respondent, the Crown is not concluded by the payment and is entitled to claim it from him in a separate suit. But, nevertheless, the Court has a duty to perform under the express provisions of the Act before it decrees payment. It has to determine whether the person claiming the amount of compensation, whether for the land or the buildings on it or other interests in it, has the right to receive it in the capacity which he asserts. Under these circumstances it is not sound law, not to say justice, to say to the Crown: "You can sue the claimant if you think you are entitled to what he claims."

I have so far dealt with the case on the assumption that what is claimed on behalf of the Crown is the proprietary title to, or fee-simple of, the land and not merely the right to levy assessment, which exists in the case of lands held by one of its subjects as proprietor, liable to pay assessment. In *Naoroji Beramji v. Rogers*⁽³⁾, the opinion was expressed "that most, though not all, of the lands in Bombay are held in perpetuity," and were estates in which the possessors had a permanent interest. In the case of such lands, the fee-simple of the land would be in the occupier, not in the Crown; and the former would be entitled to the amount of compensation as owner interested in the land. Whether the Government demand called assessment or pension tax, or quit-rent, or ground rent, is in reality a tax or rent, is a difficult problem, which has given rise to serious controversy among statesmen and political economists. Macleod, J., thinks the demand in such cases is a

(1) (1879) 4 Ex. Div. 172.

(2) (1886) 17 Q. B. D. 658 at p. 664.

(3) (1887) 4 Bom. H. C. 1 at p. 103.

tax. I will not venture to discuss that question, because it is not necessary for the purposes of this case. By the pleadings in the Court below, the title asserted on behalf of the Crown is that of owner of the land, who let in the respondent as a tenant for specific purposes, meaning that the latter had no fee-simple of the property. The question before the Court, therefore, is whether at the date of acquisition by the Collector the respondent had any right to the land apart from the buildings, entitling him to receive the amount of compensation which remains after deducting the amount payable for the buildings as "a person interested in the land."

On these grounds, the decree appealed from must be reversed. As that decree was passed by the learned Judge on the ground of want of jurisdiction to decide the question of title, the disposal of the case by him must be regarded as one on a preliminary point and the case must be remanded for a decision on the question whether the claimant (respondent) had any interest in the land, as distinguished from his interest in it in virtue of the buildings, which entitles him to compensation.

If it be found that he had such interest, the Court below should determine the amount payable to him in respect of it and pass a decree accordingly. If, on the other hand, the Court holds that the respondent has no such interest in the land, he should have a decree for compensation in respect of the buildings only, since there is no dispute as to his right to it.

Before parting with the appeal, I ought to point out that, though the title of the Crown has been asserted in this case, the Crown is formally not on the record. It is represented by the Government of Bombay; but, according to law, in all litigation to which the Crown is a proper party, it is the Secretary of State for India who alone can represent it.

That is how it strikes me at present, and I say so because the point was not raised either before us or in the lower Court. If there is any legal defect on the ground I mention, it can be easily remedied by the Court bringing on the record the Secretary of State so as to make the decision final and binding in law as between the Government and the claimant.

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See *Kishan Chand v. Jagannath* ⁽¹⁾. All costs including those of this appeal shall be dealt with by the learned Judge in his discretion.

BATCHELOR, J.:—This is an appeal by the Government of Bombay from a decision of Mr. Justice Macleod in a reference from the Collector of Bombay under section 18 of the Land Acquisition Act, 1894. The material facts are these. The land in question measures 13,141 square yards and in November 1902 was notified for acquisition by Government in order to the extension of the chemical laboratory in the vicinity of the Sir J. J. Hospital. Certain buildings of considerable value stood upon the land. The usual inquiry prescribed by the Act was begun and continued by the Collector, apparently on the footing that the title to the land as well as to the buildings was in the claimant-respondent, Esufali Salebhai; but on 29th June 1904 in the course of the inquiry, the Government Solicitor, appearing in what he described as "a new attitude," set up the contention that the land was entirely the property of Government and was held by the respondent on sufferance only. The Collector proceeded with his inquiry and dealt with this disputed question of title. In the end he found, for reasons stated, that the respondent "is thus only a tenant of Government on sufferance, and, Government having through their Solicitor given him notice to quit or deliver up possession of the land under acquisition (Ex. No. 14), which notice has already expired, is entitled to compensation for buildings only, which I accordingly grant." The Collector found that the amount of compensation due in respect of the buildings was Rs. 41,633-2-2, which sum he awarded to the respondent. The compensation due in respect of the land was estimated by the Collector at a little over Rs. 2 lakhs, but, of course, no part of this sum was awarded to the respondent, as the land was, in the Collector's view, the property of Government. The respondent, being dissatisfied with this decision, claimed a reference to the High Court on the grounds (1) that the amount of compensation awarded for land and buildings was inadequate, and (2) that Government

⁽¹⁾ (1902) 25 All. 133.

were not entitled to the full value of the land. The reference was heard by Macleod, J., who altered the Collector's figure for the compensation due for both land and buildings from Rs. 2,36,438 to Rs. 2,35,264-7-1 *plus* 15 per cent. for compulsory acquisition and awarded this entire sum to the respondent. This the learned Judge did though he held that neither he nor the Collector had jurisdiction to determine the question of title between Government and the respondent. The result, therefore, is that the respondent gets the large sum of Rs 2 lakhs on a claim which the learned Judge declined to adjudicate upon and which the Collector decided in favour of Government; in other words, Mr. Justice Macleod was of opinion that even if Government were the owners of this land, the large compensation due for its acquisition must none the less be handed over to the respondent. This result may, I think, be safely described as startling on the face of it; and it seems clear from the judgment that the learned Judge accepted it only because he conceived himself to have no means of avoiding it upon the language of the Act. That is the sole ground upon which the decision is sought to be justified in appeal, and it is manifest that upon no lower ground can it be supported. Mr. Jardine's argument was that if, owing to faulty draftsmanship or other defect of the Act, its plain effect is as the Court below held, then his client is entitled to take advantage of this circumstance. That, no doubt, is so; but the conclusion is one which the Court will be astute to avoid, if that can be done with due regard to the words of the statute. For we must not lightly attribute to the legislature the intention of working injustice by taking away A.'s property and giving it to B.; in this case taking away what, on the argument, is Government's property and giving it or its value to the respondent. The object of the Land Acquisition Act is to empower Government compulsorily to acquire land on payment of due compensation to the persons dispossessed, and compensation, as I understand it here, means indemnity for monetary loss suffered. It would be strange, indeed, if the result of such an Act were that a person from whom certain buildings were acquired was entitled not

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only to receive compensation for his buildings acquired but to put into his pocket a very large sum of money in respect of land which *er hypothesi* belonged to somebody else; that is, in substance, to take away one man's property and give it to another, and the name for a process of that sort is certainly not compensation. If, then, that is the apparent effect of the statute, we must proceed to consider whether it is its real effect, and in so considering we must apply the recognised rules of construction adapted to such a case. Those rules are stated by Maxwell in the following words:—"Where the language of a statute," says that learned author, "in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence." This passage, for which ample authorities are cited in the text, is adduced merely to illustrate the lengths to which the Court is entitled to go in such cases, here, I think, it is not necessary for us to go nearly so far.

For upon what grounds are we asked to take this severely technical view of the provisions of the Act? Stated briefly, the argument is that, under the Act, Government cannot acquire what is already their own property; that the land here being Government's, Government are not "persons interested" within the meaning of section 3 (b); that when once the compensation due for the whole property, land and buildings, has been ascertained, that whole sum must be awarded to the claimant, or, if there are several claimants, must be apportioned among the claimants; and that, since Government were not "persons interested" or claimants, the only claimant before the Court was this respondent, who consequently was entitled to receive the whole compensation, even though Government were in fact the owners of the land. That was the view which found favour with Macleod, J., and which, on that ground alone, is entitled to great respect: for, in the decision of references under this particular Act and in the administration of the Act generally, that learned Judge has special knowledge and experience to which I can make no claim,

I have, however, indicated why, in my view, the conclusion to which he felt himself compelled to come cannot be accepted unless it be imperatively required by the Act; and to those reasons may be added this consideration that, if the lower Court's reading of the Act is right, then Government could never acquire any parcel of land in which they themselves had any interest, great or small, for that interest would go for nothing. Mr Jardine admits that this would be a necessary consequence, and suggests that, in order to remove the difficulty, Government would have first to sell their own interest so as to render the land a fit object for the operation of the Act. It appears to me that this comes very near to being a *reductio ad absurdum* of the case for the respondent, for it is surely unreasonable to hold that if Government are minded to acquire a parcel of land in which they already hold, say, nine-tenths of the entire interest, they must begin by selling the nine tenths in order to acquire the entirety, and that though the entirety is acquired by nothing more or less than a forced sale to Government under the provisions of this Act. For the purposes of the present argument it is, of course, assumed that Government are the owners of the land here, and the foregoing considerations seem to me strongly to suggest that, in those circumstances, the respondent can, under the Act, found no claim to the value of the land. In *Bombay Improvement Trust v. Jalbhoy*⁽¹⁾ following *Collector of Belgaum v. Bhumsag*⁽²⁾, I expressed the opinion that the Act contemplates an inquiry to ascertain the value of the land itself considered as if all interests combined to sell; and I see no reason at present to alter that opinion as to the general scheme of the Act. It is, however, admitted that the point now before us was not decided in *Jalbhoy's case*, but is *res integra* for our decision now. As seems to be conceded on all hands, the draftsmanship of the Act has hardly stood the strain of the severe investigation which its provisions have undergone in this Court in recent years, and it is probably true that the form of procedure prescribed is not easy to adapt to cases of any great complication. But if we except certain matters of indirect inference

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(2) (1903) 10 B.m. L. R. 657.

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from the form of procedure, there is nothing in the Act which excludes from its operation cases where Government hold some interest in the land to be acquired, while the extreme frequency of such cases forbids the theory that they were omitted *per incuriam*. And as to the argument that in such cases the Collector would be acquiring, not the land itself, but the separate interest in the land, which the Act does not authorize, I think that that is open to this answer. The procedure laid down in the Act is so laid down as being appropriate to the special case which is considered in the Act, *i. e.*, the case where the complete interest are owned privately. But that special case is, as I understand it, singled out by the legislature as the norm or type with the intent that in other cases which only partially conform to the type the procedure should be followed in so far as it is appropriate, not that such cases should be excluded from the Act because they do not wholly conform to the type. In other words Government, as it seems to me, are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation based upon the market value of the whole land, must be distributed among the claimants. In such circumstances, as it appears to me, there is no insuperable objection to adapting the procedure to the case on the footing that the outstanding interests, which are the only things to be acquired, are the only things to be paid for. There may be some difficulty in harmonising his view with some of the procedure sections of the Act, but bearing in mind the particular purposes for which that procedure seems to have been designed, I think the difficulty is immeasurably smaller than that which confronts us on the counter-construction; for, on that construction, as I have tried to show, the enactment is fertile not only of grave inconvenience, but of positive injustice.

On the other hand, all serious difficulty is removed if once it be conceded that the combined interests held apart from Government are in such a case as this the "land" to be acquired within the meaning of section 3 of the Act, and, in my opinion, there is nothing in the Act or the decisions which pro-

hibits the adoption of this view in the state of facts now before us. In this view the only things acquired from the respondent were the buildings, and they are "land" within the definition in the Act. For these reasons I am of opinion that Mr. Justice Macleod's decree should be varied by discharging so much of it as awards to the respondent the value of the land. As to the manner in which this last question should now be dealt with, it is probable that, as the learned Judge observed, the procedure adopted by the Collector was irregular; but the question before us is, not so much what orders the Collector ought to have passed on the subject, as what order we ought to pass now that in fact the controversy as to title has been placed before the Court, and the parties have incurred all the costs incidental to getting their evidence fully upon the Court's record. It is clear that to set aside the elaborate inquiry which the learned Judge has already made, would benefit nobody, and would merely entail further costs in time and money to both the parties, who are anxious to obtain a decision on the evidence already judicially recorded. I think, therefore, that our best course is not to interfere with the enquiry made, and I should have been glad if I could have seen my way to suggesting that this Appeal Court should now decide the question. But as the decision must, at least to some extent, depend upon the appreciation of oral evidence, I conceive that the proper course is to remand the case for a decision to the lower Court under O. XLI, r. 23. The issues which remain for decision will be these:—

(1) At the material time what interest had the respondent in the land (apart from the buildings)?

(2) To what compensation is he entitled in respect of that interest?

Upon these grounds I agree with the order proposed by my learned colleague.

Attorney for Government:—*Bowen*.

Attorney for respondent:—Messrs. *Nann & Co.*

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*Before Mr Justice Macleod.*1909.
December 3.FATMABAI, PETITIONER, v. DOSSABHOY RUSTOMJI UMRIGAR
AND OTHERS, RESPONDENTS.**Application to sue as pauper—Disqualification—Subject-matter of suit—
Cause of action—Civil Procedure Code (Act V of 1908), Order XXXIII,
rules 1, 2 and 5*

A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property by the mortgagee, with an alternative claim for damages. The mortgagee, admitting there was a surplus due to the applicant after the mortgage-debt had been satisfied, paid Rs. 101 into Court, and contended that the applicant was not a pauper, and further that the applicant disclosed no cause of action.

Held, that the applicant was a 'pauper' within the meaning of the Explanation to Order XXXIII, rule 1, of the Civil Procedure Code (Act V of 1908), but that the allegations contained in the application did not disclose a cause of action.

Dwarkanath v. Madhavrao⁽¹⁾ not followed.

THIS was an application by one Fatmabai for leave to sue as a pauper under Order XXXIII of the Civil Procedure Code. In her petition she alleged that she had mortgaged certain property with the first respondent, and that the latter, acting fraudulently and collusively, had sold the property to the second respondent at a grossly inadequate price. She, therefore, prayed that the said sale should be set aside, and in the alternative claimed damages. The first respondent admitted that the sale proceeds left a surplus due to the applicant after the satisfaction of the mortgage-debt, and paid into Court a sum of Rs. 101. He then contended that the applicant, inasmuch as she was entitled to Rs. 101, was not a pauper within the meaning of the Order, and further that her petition disclosed no cause of action. The Prothonotary, following the case of *Dwarkanath v. Madhavrao*⁽¹⁾, rejected the application, and the question was, at the instance of the applicant, referred to the Judge in Chambers under rule 82 of the High Court. Macleod, J., adjourned the matter into Court.

* Pauper Petition No 17 of 1909.

(1) (1886) 10 Bom. 207.

Robertson showed cause for the respondents.

Baptista appeared in support of the application.

MACLEOD, J. :—The applicant presented this application to the Prothonotary under Order XXXIII of the Civil Procedure Code for leave to sue as a pauper. Under rule 2 her application was bound to contain all the particulars required in regard to plaints in suits, and was therefore bound to show a cause of action. Under rule 3, the Court shall reject an application for permission to sue as a pauper *inter alia* when the applicant is not a pauper or when his allegations do not show a cause of action.

The proposed suit was to set aside a sale to the second respondent effected by the first respondent as mortgagee. The applicant as the mortgagor alleged that the mortgagee had not properly advertised the sale and had acted in collusion with the purchaser. The first respondent admitted that there was a surplus due to the applicant after the amount due on the mortgage had been satisfied and paid into Court Rs. 101. He then contended (1) that the application disclosed no cause of action; and (2) that the applicant, being entitled to the sum of Rs. 101 paid in the Court, was not a pauper.

The Prothonotary rejected the application on the ground that the applicant was entitled to Rs. 101, following the decision in *Dwarkanath v. Madharai*⁽¹⁾.

The applicant then applied, under rule 82 of the High Court Rules, for the matter to be adjourned to the Judge in Chambers and it came on for argument before me.

With all due respect to the learned Judge who decided the case of *Dwarkanath v. Madharai*⁽¹⁾, I am of opinion that his decision should not be followed; otherwise, whenever an application for permission to sue as pauper is made the respondent can always get the application rejected by paying into Court Rs. 100 out of the amount claimed.

In construing an explanation to a section or rule it is necessary to refer to the section or rule itself. No doubt, in rule 5 (e) reference is made to the 'proposed' suit, whereas in the explana-

⁽¹⁾ (1886) 10 Bom. 207.

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tion to rule 1 the word 'proposed' has not been inserted. It is also clear that at the time an application is presented there is no suit in existence. But the only suit that can be referred to in the explanation to rule 1 is the suit which may be instituted under the rule, and to put any other interpretation on the term 'the suit' would make it meaningless. The words 'such suit' in the first part of the explanation clearly refer to the suit which may be instituted by a pauper as soon as his application to sue as a pauper has been accepted. As a matter of drafting, it was not necessary to use the word 'such' a second time. There was, therefore, no necessity to use the word 'proposed' in the explanation, though it was necessary in rule 5 (e). However, on the first ground which was not decided by the Prothonotary, I think the application must be rejected as the allegations contained therein do not show a cause of action. But the rejection will be without prejudice to the applicant's right to make another application which does show a cause of action. She must, however, as a condition precedent, pay the respondents' costs of opposing this application.

Attorneys for the petitioner:—Messrs. *Jehangir, Mehta and Somji*.

Attorneys for the respondents:—Messrs. *Mulla and Mulla*.

K. M. I. K.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1910.
February 28.

BAPUJI SORABJI FRAMJI AND OTHERS, APPELLANTS AND PLAINTIFFS,
v. THE CLAN LINE STEAMERS, LIMITED, AND OTHERS, DEFENDANTS
AND RESPONDENTS.*

Stoppage in transitu—Ultimate destination of goods—Duration of transit—Pledge of bill of lading—Measure of damages—Sale of Goods Act (56 and 57 Vic., c. 71), sections 45 and 47.

The plaintiffs, a Bombay firm, imported hardware goods from M. & Co. of Manchester for sale on commission, the business being carried on and financed

* Original Suit No. 366 of 1908

Appeal No. 27 of 1909.

in the following manner. M. & Co., on shipping the goods, handed over the complete shipping documents to B, and received from him an advance of 65 per cent. of the invoice price. B then handed over the shipping documents to the National Bank of India in England, and himself received a similar advance by drawing on a credit opened with the Bank by the plaintiffs. The Bank then forwarded the shipping documents to India, where they were handed over to the plaintiffs in exchange for a trust receipt, the plaintiffs becoming responsible to the Bank for any short fall in the advances made to B.

On 12th February 1907 M. & Co. contracted to purchase from L. & Co. 250 boxes of tin plates, delivery to be F. O. B. Newport in four or five weeks after date. On 26th February M. & Co. wrote to L. & Co. enclosing instructions and marks for shipment of the 250 boxes to Bombay, and on 2nd March requested them to forward the goods to W. & Co. at Newport in time for shipment in S. S. Clan Macleod for Bombay. On 21st March L. & Co. enclosed to M. & Co. an invoice for 200 boxes and on 27th March another invoice for the remaining 50 boxes, the material part of the invoice in each case being "No claim concerning these goods can be recognized unless made within fifteen days from delivery to Messrs. W. & Co., Newport, for shipment on your account."

The 250 boxes were put on board the steamer by W. & Co. as the agents of L. & Co., but in obtaining a bill of lading for 500 boxes (including the 250 in question) W. & Co. acted as the agents of M. & Co.

The steamer left Newport on 4th April. Following the usual course of business as above described, M. & Co. handed over to B the shipping documents relating to the 500 boxes and obtained an advance of £255-5-2 (being 65 per cent. of the invoice value). B, on the 6th April, obtained a similar advance from the Bank. On the same day M. & Co. suspended payment, and on 9th April L. & Co., as unpaid vendors of 250 boxes, notified the steamship owners, the first defendants, to stop these goods in transit.

The S. S. Clan Macleod arrived in Bombay on 13th May, and the bill of lading which had been duly handed over by the Bank to the plaintiff on 29th April, was in due course presented by the latter. They were informed, however, of the stop put on the 250 boxes, and were offered a delivery order for the remaining 250 alone. This they declined, refusing to accept anything but the full payment of the advance or the full amount of the goods. On 29th June the plaintiffs repaid the Bank the amount of the advance, and the trust receipt of 29th April was duly cancelled.

On the plaintiffs' subsequently suing the steamship owners and their agents for damages,

Held, that the transit did not cease at Newport, and L. & Co. were entitled to stop the goods after they had started for Bombay.

Ex parte Golding Davis & Co. followed.

(1) (1880) 13 Ch. D. 628.

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Held, further, that the plaintiffs were, after 29th June,—on which date they had fulfilled their obligations to the Bank,—pledgees for value of the bill of lading, if indeed they did not occupy that position from 29th April, being transferees of the Bank's rights in respect of the advance as against the defendants.

Held, further, that the plaintiffs were entitled to join both defendants in the suit.

The utmost benefit which the defendants were entitled to obtain from the position of L. & Co. as sureties [sc. to the plaintiffs for the advance made by the latter to M. & Co.] was the right to the security of the 250 boxes which they were willing from the outset should be received by the plaintiffs. The plaintiffs by refusing to take delivery of the 250 boxes had omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission had resulted in loss, the surety was discharged.

In re Westzintus⁽¹⁾ discussed.

IN and prior to the year 1907 the plaintiffs carried on the business of importing hardware into Bombay for sale on commission. Among their constituents in England were Millerson & Co. of Manchester. The course of business followed by the parties and the arrangements by which Millerson & Co. were financed were as follows. Millerson & Co. on shipping goods handed over the complete shipping documents to one Bloch, and received from him an advance of 65 per cent. of the invoice price of the goods. The business was at the risk of Millerson & Co. who were responsible to Bloch for any short fall resulting from the goods realising less than the amount advanced. Bloch's commission, in consideration of his financing the business and bringing Millerson & Co. into direct communication with the plaintiffs in India, was 8½ per cent. on the invoice value of the goods. Bloch then handed over the shipping documents to the National Bank of India in England, and himself received an advance of a similar amount by drawing on a credit opened with the Bank by the plaintiffs. The shipping documents were then forwarded by the Bank to their Bombay branch and handed over to the plaintiffs in exchange for a trust receipt, under which the plaintiffs became absolutely responsible to the Bank for any short fall in the advances made to Bloch. The plaintiffs then realised the goods at the best price obtainable, and rendered account sales for the same. If any short fall

(1) (1883) 5 B. & Ad. 817.

resulted on realisation the plaintiffs held Millerson & Co. in the first instance, and, in default of them, Bloch as guarantor liable to make good to them the amount of the advance. By a contract dated 12th February 1907 Lloyd & Co., sold to Millerson & Co., 250 boxes of tin plates, the terms of the contract providing for delivery F. O. B. Newport in four or five weeks from date and payment less 4 per cent. discount in fourteen days. In a letter of 26th February Millerson & Co. gave instructions to Lloyd & Co. and enclosed marks for shipment of the goods to Bombay, and in a subsequent letter of 2nd March instructed them to forward the goods to Whittingham & Co., at Newport in time for shipment to Bombay in S. S. Clan Macleod. An invoice for 200 boxes was sent by Lloyd & Co. to Millerson & Co., on 21st March and a further invoice for the remaining 50 boxes on 27th March. The material parts in each invoice were:—

“ No claim concerning these goods can be recognized unless made within fifteen days from delivery.”

‘ F. O. B. Newport.’

“ To Messrs. Whittingham & Co., for shipment on your account.”

Whittingham & Co., acting as agents of Lloyd & Co., put the goods on board, but they obtained the bill of lading (which related to a total consignment of 500 boxes) as agents of Millerson & Co. The S. S. Clan Macleod left Newport on 4th April 1907, and on the following day Millerson & Co. handed Bloch the shipping documents, and, according to the usual course of business, requested an advance of £255-5-2, being 65 per cent of the invoice price. This advance was duly made, and on 6th April Bloch handed the documents to the National Bank and himself received an advance of a similar amount. The Bank thereupon forwarded the documents to India, and handed them over to the plaintiffs in exchange for a trust receipt dated 29th April 1907.

Meanwhile, on the same day on which the Bank had made the advance to Bloch, Millerson & Co., suspended payment and called a meeting of their creditors for 12th April. On 9th April Lloyd & Co. gave notice to the owners of the S. S. Clan Macleod to stop the 250 boxes of which they were the unpaid vendors.

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This notice was communicated to Bombay, and when on the arrival of the steamer the plaintiffs presented the bill of lading they were informed by the shipowners' agents of the stop put upon the goods and were offered a delivery order for the remaining 250 boxes alone. This they refused to accept, demanding either delivery of the whole consignment or payment in full of the advance. On 29th June 1907 the plaintiffs repaid to the Bank the amount due on account of the advance and interest, and the trust receipt of 20th April was duly cancelled. On 5th May 1908 this suit was filed, against the shipowners and Messrs. Finlay Muir & Co, their agents, for the recovery of £2 5-5-2 with interest. The suit came before Mr. Justice Macleod, and was dismissed with costs, the learned Judge holding (*inter alia*) that Lloyd & Co. were the unpaid vendors and the goods were in transit when the notice to stop was received; that the plaintiffs had no cause of action against the second defendants; that the transfer to the plaintiffs of the bill of lading was not by way of pledge or other disposition of value; and that in any event the plaintiffs were bound to exhaust their other securities before proceeding against the goods stopped.

The plaintiffs appealed.

Strangman (Advocate General), with *Inverarity* and *Cohen*, for the appellants.

The reasons of the learned Judge for holding that the second defendants were wrongly joined are not apparent. They refused to give up the goods, and it is immaterial that they were agents acting on the instructions of their principals: *Cianch v. White*⁽¹⁾ and *Davies v. Vernon*⁽²⁾. An agent who converts goods under orders from his principal is liable for the conversion severally and jointly with the principal. The goods in question, after being placed on board the ship at Newport, ceased to be in transit from Lloyd to Millerson. The contract contained the provision that delivery was to be F. O. B. at Newport and that payment was to be made fourteen days after delivery. The notice requiring claims to be made within fifteen days of delivery

⁽¹⁾ (1885) 11 Bing. N. C. 414.

⁽²⁾ (1844) 6 Q. B. 443.

at Newport is also significant. The bill of lading was made out in the name of Millerson and not Lloyd, and included goods which were not Lloyd's. Delivery was thus clearly given to Millerson at Newport. If Whittingham & Co. were acting as agents of Lloyd, they were doing so only for the purpose of giving delivery to Millerson on the steamer named by Millerson. The case is on all fours with *Cowasjee v. Thompson*⁽¹⁾, where, although, as here, the seller had put the goods on board, they were held to be no longer in transit. See also *Schotsmans v. Lancashire and Yorkshire Railway Co.*⁽²⁾ and *Ex parte Miles*⁽³⁾. It is not disputed that Millerson pledged the goods to Bloch and that Bloch pledged them to the Bank. If it is argued that the Bank took the pledge on their own account and not 'on the plaintiffs, then by delivery in exchange for the trust receipt they transferred to the plaintiffs all their rights as pledgees. Thus the goods covered by the bill of lading were specifically pledged to the plaintiffs, and apart from the question of duration of transit they were entitled to receive from the defendants either the goods or their invoice value or the sum for which they were pledged. With regard to marshalling the defendants are clearly not entitled to put forward any claim. The doctrine of marshalling only applies to securities within the control of the Court: see *Wells v. Smith*⁽⁴⁾. Further, the point was not raised in the written statement, and the plaintiffs' position with regard to the goods must have changed between the date of the arrival of the ship and the time when the point was taken.

Robertson, with *Lowndes*, for the respondents.

The master of the *Clan Macleod* received the goods merely as carrier to Millerson. The goods were *sold* F. O. B., but transit did not end till the termination of the voyage. Lloyd had marked the goods for Bombay and the ship was bound for Bombay: see *Berndtson v. Strang*⁽⁵⁾. The case of *Cowasjee v. Thompson*⁽¹⁾ is not really a case of stoppage *in transitu* at all. The case turned on the point that the goods had been paid for. So in

(1) (1845) 3 Moo. I. A. 422.

(3) (1885) 15 Q. B. D. 39.

(2) (1867) L. R. 2 Ch. 332.

(4) (1885) 30 Ch. D. 192.

(5) (1867) L. R. 4 Eq. 481.

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Ex parte Miles⁽¹⁾ the facts were such as to show that the transit ended on shore. The cases of *Bethell v Clark*⁽²⁾, *Berndtson v. Strang*⁽³⁾ and *Ex parte Rosevear China Clay Co.*⁽⁴⁾ all show that it does not matter whether Whittingham & Co took out the bill of lading as Millerson's agent or not. See also as to duration of transit *Jackson v. Nichol*⁽⁵⁾, *Spalding v. Ruding*⁽⁶⁾ and *Kemp v. Falk*⁽⁷⁾. Again, the plaintiffs were only factors, not *bond fide* pledgees for value. In any case they were not pledgees till 29th June 1907. The defendants can claim the right to marshal. And this right extends not only to the other 250 cases but to all other goods of Bloch's which are in the plaintiffs' possession. see *In re Westanthus*⁽⁸⁾. *Webb v Smith*⁽⁹⁾ has no relation to this case. When the shipmaster receives notice to stop, he is bound to deliver to the unpaid vendor: Sale of Goods Act, section 46 (2). See also *The Tigress*⁽¹⁰⁾.

Strangman in reply cited *Kendal v. Marshall Stevens & Co.*⁽¹¹⁾, *Ex parte Gibbes*⁽¹²⁾, *In re Winkfield*⁽¹³⁾ and *Cahn v. Pockell's Bristol Channel Steam Packet Company, Ltd*⁽¹⁴⁾.

SCOTT, C.J.:—The first question which has been argued in this case is whether at the time when Lloyd & Co. gave a notice to the "Clan Macleod" at Liverpool on the 9th of April 1907 to stop the goods which they had despatched under a contract of sale to Millerson & Co. the goods were in transit or had reached the possession of Millerson & Co. or any person on their behalf.

The contract for the sale of the 250 cases supplied by Lloyd & Co. was made in England and the obligations incidental to that contract must be decided according to the law of England.

Section 45 (1) of the Sale of Goods Act, 1893, is as follows.—

"Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the

(1) (1885) 15 Q. B. D. 39.

(2) (1888) 20 Q. B. D. 615.

(3) (1867) L. R. 4 Eq. 481.

(4) [1879] 11 Ch. D. 560.

(5) (1839) 5 Bing N. C. 508.

(6) (1843) 6 Beav. 376.

(7) (1882) 7 A. C. 573.

(8) (1893) 5 B. & Ad. 517.

(9) (1885) 30 Ch. D. 192.

(10) (1863) 32 L. J. Ad. 97.

(11) (1883) 11 Q. B. D. 356.

(12) [1875] 1 Ch. D. 101.

(13) [1902] P. 42.

(14) [1899] 1 Q. B. 643.

purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian."

This appears to be a codification of the case law of England upon the subject.

The appellants are the holders of a bill of lading issued by the agents of the "Clan Macleod" in favour of Millerson & Co. acknowledging the shipment by them on board that steamer of 500 boxes of tin plates of which 250 are the boxes which the vendors gave notice should be stopped *in transitu* on the 9th April 1907.

The contract under which these goods were sold to Millerson & Co. provided that delivery should be F. O. B. Newport in four or five weeks from the 12th of February 1907—terms of payment less 4 per cent. discount in fourteen days.

On the 26th of February 1907, Millerson & Co. wrote to Lloyd & Co. as follows:—

"Herewith we beg to hand you instructions and marks for our shipment to Bombay. We have received a call from Messrs. Whittingham's agents, who tell us that the goods were too late to be shipped on the boat leaving Newport on the 28th instant. We have instructed Messrs. Whittingham and given marks same as we gave to you. We hear from them that the next boat from Newport sails the third week in March, kindly 'ave our order ready for this boat and oblige."

To that letter was appended a diagram of the mark to be put upon the cases by Lloyd & Co. which indicated that the cases were to be shipped to Bombay.

On the 2nd of March 1907, Millerson & Co. again wrote to Lloyd & Co.:—

"We have this day received notice from Messrs. W. M. Whittingham that the next steamer leaving for Bombay is the "Clan Macleod" closing on the 30th inst. Kindly forward goods to them in time for a shipment by this steamer and oblige."

On the 21st of March 1907, Lloyd & Co. enclosed to Millerson & Co. an invoice for 200 out of the 250 boxes contracted for, of which the material parts are as follows:—

"No claim concerning these goods can be recognised unless made within fifteen days from delivery to Messrs. W. M. Whittingham & Co., Newport, for shipment on your account."

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That was followed on 27th March by an invoice in the same terms relating to the 50 boxes remaining to make up the total amount contracted for.

Messrs. Whittingham & Co. were the agents of Lloyd & Co. for the purpose of putting the 250 boxes upon the steamer under the contract for delivery F. O. B. and they were paid by Lloyd & Co. for that service. It is, however, not disputed that Whittingham & Co. also did some work for Millerson & Co. for they obtained from the agents of the steamer the bill of lading above referred to relating to the 250 boxes supplied by Lloyd & Co. and 250 belonging to Millerson & Co. received from other suppliers. Under these circumstances the appellants contend that the transit from Lloyd & Co. to the buyer ended at Newport, the place designated in the contract for delivery; although Bombay had been mentioned subsequently to the sellers as being the ultimate destination of the goods. It is urged that the bill of lading shows clearly that the goods had reached the hands of an agent on behalf of the buyers who was required to do something on account of the buyers in order to forward them to their ultimate destination, that it cannot be said that in obtaining the bill of lading Whittinghams' servant was the agent of the sellers inasmuch as the bill of lading related to 250 boxes with which the sellers were in no way concerned. Reliance is also placed upon the clause in the invoice that no claim concerning these goods can be recognised unless made within fifteen days from delivery, that is, from delivery at Newport, and it is said that the sellers cannot be allowed to say that all their obligations end within fifteen days from delivery at Newport if for the purpose of transit the place of delivery is to be taken to be Bombay. With regard to this clause in the invoice it is to be observed that it is no part of the contract. It is a warning of a kind which sellers often put in bills and invoices but it does not follow that it is anything more than a *brutum fulmen*. If this clause is eliminated from consideration it is difficult to find any point relied upon by the appellants which was not also present in the case of *Ex parte Golding Davis and Co.*⁽¹⁾, a case which bears a singularly close resemblance to that

(1) (1880) 13 Ch. D. 623.

which we have now under consideration so far as the question of transit is concerned. There the contract was made between the suppliers and their buyers for delivery of 100 drums per month; shipment F. O. B. Liverpool, and the buyers actually had a branch at Liverpool. After the contract was made, the buyers' Liverpool branch sent instructions to the suppliers to ship 100 drums on board a named ship for New York then lying at Liverpool. The goods were accordingly shipped by the suppliers. The wharfinger's receipts stated that they were received for shipment on board the ship on account of the buyers at Liverpool. That receipt was handed to the shipping brokers of the ship who then procured the signature of the master of the ship to the bill of lading, the bill of lading stated that the goods were shipped by Taylors and Sons, who were buyers from the original buyers to be delivered unto order or to assigns at New York. The original buyers having suspended payment the suppliers served a notice of stoppage *in transitu* on the master of the ship, the ship's agents and the brokers for the ship. The Registrar in Bankruptcy held that the notice was of no effect, on the ground that, the bill of lading being in the name of sub-purchasers the property in the goods was transferred to them, and the *transitus* was at an end as between the suppliers, and the original buyers, when the goods were placed on board and the bill of lading was made out. An appeal was preferred and it was argued for the respondents that what took place was equivalent to a delivery of the goods to the original buyers at Liverpool and a sending of the goods on a new *transitus* and that the signing of the bill of lading by shipmaster in favour of the sub-purchaser was a complete attornment. James, L. J., however, said:

"A mere transfer of a bill of lading or any other sale of the goods, though it transfers the whole property in the goods, does not determine the *transitus*. And it seems to me that the goods now in question were clearly *in transitu* at the time when the transaction took place between Knight and Son and Taylor and Sons. They left the vendors' warehouse for the purpose of their being put on board a ship which was to deliver them in New York. That *transitus* was never altered and never ceased, because the goods have since been delivered in New York accordingly. There was a *transitus* continuing from the vendors' warehouse to New York."

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Cotton, L. J., said :

"The journey indicated by the contract between the original vendors and the purchasers was still continuing, there had been no new or different journey, indicated, and that entirely distinguishes the case from that which possibly was in the mind of the Registrar, where on the original purchase one journey had been contemplated, but in consequence of a contract between the original purchaser and the sub-purchaser he directs that the goods shall go to a different terminus. In such a case, of course the right of stoppage *in transitu* is at an end, because what is done is equivalent to the original purchaser taking possession of the goods and dealing with them by means of that possession. It was urged by Mr. Winslow that what occurred in the present case was equivalent to that, but, in my opinion, that view cannot be sustained. I think that what was done had just the same legal effect as if the bill of lading had been made out in the name of the original purchaser, and had then been assigned by them to their sub-purchasers. There was nothing done by the purchasers to alter the destination agreed upon between them and the original vendors, no actual taking possession of the goods, and, in my opinion, there was nothing which can be considered as equivalent to their doing that, and then starting the goods as from their possession on a different and new voyage."

The decision in that case was attacked subsequently on a different point, but it has never been doubted that the judgments with regard to the question whether the transit had ended were correct. In the subsequent case of *Ex parte Falk*⁽¹⁾, Baggallay, L. J., said :

"I desire to add that the doubts which, in *Ex parte (Holding) Davis & Co.*, I said that I had entertained during the argument turned entirely upon the special circumstances of that case. My doubt was whether the goods had not been delivered at Liverpool to Knight and Son and then started on a fresh *transitus*. Upon consideration I was satisfied that that was not the right view of the facts."

Even if the position of Whittingham & Co. in the present case were less equivocal and if they had been employed solely on behalf of the buyer and not on behalf of the sellers it would not be conclusive in favour of the appellants' contention.

Mr. Justice Mathew in *Bethell v. Clark*⁽²⁾ said :

"The authorities show that although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit."

(1) (1880) 14 Ch. D. 446.

(2) (1887) 19 Q. B. D. 500.

For these reasons, we think, that the learned Judge of the lower Court was right in holding that the transit did not cease at Newport and that Lloyd & Co. were entitled to stop the goods as they did after they had started on a voyage to Bombay.

The next question which arises is whether the right of stoppage exercised by Lloyd & Co. is limited by the existence of any rights in the plaintiffs. The proviso to section 47 of the Sale of Goods Act, 1893, is as follows:—

“Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale the unpaid seller's right of lien (or retention) or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien (or retention) or stoppage *in transitu* can only be exercised subject to the rights of the transferee.”

It is to be observed that the terms of that proviso do not apply to the facts of the present case for, here the bill of lading has not been “transferred” to any person as buyer or owner of the goods. It was issued by the agents of the ship to the buyers and by them endorsed as security for advances made. It is, however, we think, clear that the position of a pledgee of a bill of lading issued on behalf of the ship to the buyer is not worse as against an unpaid seller stopping *in transitu* than the position of a pledgee from a buyer of a bill of lading issued originally to the seller and transferred by him to the buyer of the goods. Thus in *Kemp v. Fulk*⁽¹⁾, a case in which the rights of the pledgee of a bill of lading were given effect to in priority to an unpaid seller stopping *in transitu*, Lord Blackburn stated that bills of lading were made out which were signed not as is usual by the master but by the shipowner himself and that Mr. Kiel (the buyer) got those bills of lading.

The question then is whether the plaintiffs represented any interests acquired by way of pledge of the bill of lading.

(1) (1882) 7 A. C. 573.

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The plaintiffs had prior to 1906 business dealings with one Albert Bloch selling goods for him on commission. In July 1906, Bloch arranged with Millerson & Co. a hardware consignment business to Bombay on terms set out in his letter of the 30th July 1906. The business was to be at risk for account and debit of Millerson & Co. who were to consign the goods. Millerson & Co. were to hand to Bloch complete shipping documents in exchange for 65 per cent. of the amount of the invoice. Should the goods after deducting all charges realise less than the 65 per cent. advanced Millerson & Co. were to refund to Bloch any short fall, on the other hand, any surplus that might arise was to be credited to Millerson & Co. in account. In consideration of Bloch putting Millerson & Co. in direct communication with his constituents in India and of his financing the business his commission was to be 3½ per cent. on the invoice value of the goods to be paid when the advance should be made. It was agreed that when account sales were rendered from India the goods would be charged with the selling commission, etc., of 3½ per cent. in addition to Bloch's commission as well as out of pocket and customary incidental expenses in India; interest at 6 per cent. being charged on the sums advanced; all goods were to be sold on or before arrival and in no case were any goods to remain unsold for a longer period than three months from date of shipment. Bloch then arranged with the plaintiffs to finance him and to sell Millerson & Co.'s goods. The terms of this business are set out in a letter addressed by the plaintiffs to Bloch dated the 23rd of November 1906.

We now beg to enumerate the terms of this business as settled by our Mr. K. S. Framji and shall thank you to confirm same

(1) You are to receive from the National Bank of India, Ltd, on handing over to the Bank complete shipping documents of the goods shipped to us as consignments by Messrs A. Millerson & Co, 65 per cent. of the invoice value of the goods.

(2) We are to realise these goods at best price that we can obtain for them at our discretion and render account sales for same. Should there be any short fall in the amount advanced as above the same is to be made good to us by Messrs. A. Millerson & Co., in the first instance, failing which you are to make good the same as you guarantee these friends,

(3) We are to deduct from the sale-proceeds all charges, interest, incurred upon the goods plus a commission of $3\frac{1}{2}$ per cent. on all goods (including 1 per cent. for finance commission), and a commission of $2\frac{1}{2}$ per cent. (including finance) on all yarns.

(4) We are to finance this business to such amounts and to such extent as we may deem right.

(5) The above terms also apply to manufacturers, direct business to India.

The second term is important. The plaintiffs' duty was to realise the goods and any short fall on realisation in the amount advanced was to be made good to plaintiffs in the first instance by Millerson & Co., failing which, Bloch was to make it good as guarantor.

In order to carry out these arrangements the plaintiffs arranged with the National Bank of India in London to finance the consignments that might be sent to the plaintiffs by Millerson & Co. through Bloch by paying to Bloch 65 per cent. of the invoice value of the goods on his handing to the Bank complete shipping documents for the same, the Bank being bound to hand over the documents to the plaintiffs' firm in Bombay upon the terms existing between them for that class of business and up to the amount of the cash credit allowed to them by the Bank. The plaintiffs were also to be responsible to the Bank for any short fall in the advances made by them to Bloch.

On the 5th of April 1907, Millerson & Co. delivered to Bloch bills of lading and invoices for the 500 boxes of tin plates already referred to shipped by "Clan Macleod," to the plaintiffs in Bombay and requested payment of the advance of 65 per cent. upon the invoice value amounting to £255-5-2. On the same day Bloch acknowledged the receipt of the documents and enclosed his cheque for £255-5-2. That cheque was received by Millerson & Co. on the 6th of April. On the 5th April Bloch handed to the National Bank the documents for the 500 cases and requested payment of a cheque for £255-5-2 being 65 per cent. of the invoice value. A cheque for this amount was sent to Bloch on the 6th of April. On the same day Millerson & Co. called a meeting of their creditors for the 12th of April and on the 9th of April Lloyd & Co. notified the first defendants to stop

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the 250 cases supplied by them to Millerson & Co. The shipping documents after being received by the Bank were transmitted in the usual course of business to Bombay and were handed to the plaintiffs on the 29th of April in exchange for a trust receipt of that date, whereby the plaintiffs undertook in consideration of the Bank handing to them the shipping documents held as security for the payment of £255-5-2 to land, store, and hold the goods until sale, and sell the goods as the agent or trustees of the Bank, and until such sale to hold the goods and afterwards the sale-proceeds thereof as the property of the Bank, and subject to the Bank's security thereon, and to hand the proceeds of sale to the Bank advising them in respect of what shipment the payment was made, so that, they might apply the payment to its appropriate advance undertaking that the proceeds of the goods should be treated by plaintiffs as belonging to the Bank and earmarked as the Bank's property until the advance should be fully paid and satisfied by the plaintiffs, and the plaintiffs undertook that if the goods covered by the trust receipt should not be sold for cash, or if in the case of any goods delivered against Bazaar chits or promissory notes, the Bazaar chits or promissory notes should not be realised in sufficient time to permit of the advance being paid at the due date to hand to the Bank within sixty days the full amount of the advance money with interest at 7 per cent. running from the 6th of April 1907 up to the approximate date of arrival of remittance in London, such payments to be made in sterling.

We entertain no doubt that Bloch was the pledgee of the bills of lading from Millerson in consideration of the advance of £255-5-2, that the National Bank were pledgees of the bills of lading from Bloch in consideration of the advance to Bloch of that sum at the request of, and for and on account of, the plaintiffs, and that the plaintiffs were the holders of the bills of lading under their arrangements with the Bank being bound to repay to the Bank the full amount of the advance made to Bloch by the 29th of June 1907. There is no question but that the plaintiffs fulfilled their obligations to the Bank by handing to them on that date a demand draft on London in return for which they received the shipping documents together with the

trust receipt duly cancelled; and they were after that date the pledgees for value of the bill of lading if indeed they did not, being the transferees of the Bank's rights in respect of the advance of £255-5-2 as against the defendants, occupy that position from the 29th of April.

The "Clan Macleod" arrived in Bombay on the 18th of May and the plaintiffs duly presented the bill of lading for the 500 boxes of tin plates. The second defendants, however, as agents for the owners stated that with reference to the bill of lading they had been asked by Messrs. Lloyd & Co. in London to put a stop on 250 boxes marked F.E.L.S. The plaintiffs then by their letter of the 15th of May gave the second defendants the option of either delivering the whole consignment of 500 boxes on presentation of the bill of lading or making good to them the amount of the advances "paid by them" namely £255-5-2 on those goods. The second defendants, however, replied that they had been advised to deliver 250 boxes out of the 500 to Messrs. Glade & Co. and for the balance enclosed a delivery order to enable the plaintiffs to take delivery. The plaintiffs then by their solicitor's letter of the 18th of May pointed out that they had made an advance upon the whole of the 500 boxes constituting the consignment and the bill of lading, for all those boxes were assigned to them by way of pledge; that the advance was made in good faith; and that Lloyd & Co. were not entitled even though they might be unpaid vendors to stop the goods in transit except on payment or tender to the plaintiffs of the advance which had been made. The only reply from the second defendants was that they had given the plaintiffs a delivery order for 250 boxes out of the consignment under instructions from the owners of the steamer and beyond that they were not prepared to accept any responsibility. The plaintiffs having declined to accept anything but the full payment of the advance or the full amount of the goods mentioned in the bill of lading, the 250 boxes, which were not the subject of Lloyd & Co.'s stoppage orders, were eventually sold, and realised about Rs. 600.

It appears that the defendants refused delivery to the holders of the bill of lading under an indemnity received from Lloyd

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& Co. But as they had not offered to discharge the lien of the defendants for £255-5-2, Lloyd & Co. were not entitled to receive the goods and the shipowners, namely, the first defendants and their agents, the second defendants, are liable for conversion and the plaintiffs are entitled to join them both in this suit: see *Bates v. Pullings*⁽¹⁾; *Leslie v. Wilson*⁽²⁾.

The next question which arises is: What is the amount of the liability? The case was argued on the footing that the defendants, though bailees, were entitled to set up against the plaintiffs a *jus tertii*, namely that of Lloyd & Co. It was urged on behalf of the defendants, and the argument found favour with the learned Judge, that assuming the plaintiffs at the date of suit to be the pledgees of the bills of lading the liability of the defendants is nil, because the plaintiffs had other means of securing payment of the advances made by them through the National Bank to Bloch. In support of this argument the case of *In the matter of Westzynthius*⁽³⁾ has been referred to. In that case the contest was between the unpaid seller of certain oil and the assignees of the bankrupt buyers. The pledgee of the bills of lading for the oil had held a quantity of other goods of the buyers all of which he had realised for a sum in excess of the advances made by him, and the point which was decided in the case was whether the goods of the unpaid seller could be brought into the bankrupt buyers' estate for distribution among their creditors when the pledgee of the bills of lading, who was the only person having a right superior to the unpaid seller, had already been satisfied out of the bankrupt's own assets. It was held that once the pledge had been satisfied the goods or their value must be restored to the unpaid seller.

The contention that the plaintiffs are bound to realise and enforce all other securities at their disposal before resorting to the goods of Lloyd & Co. mentioned in the bill of lading is based upon a passage in the judgment of Lord Denman where he says:

"If, then, *Westzynthius* had an equitable right to the oil, subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become

a surety to *Hardman* for *Lapage's* debt, and would then have a clear equity to oblige *Hardman* to have recourse against *Lapage's* own goods, deposited with him, to pay his debt in case of the surety; and all the goods, both of *Lapage* and *Westanthus*, having been sold, he would have a right to insist upon the proceeds of *Lapage's* goods being appropriated, in the first instance to the payment of the debt."

The learned Judge in the lower Court treating *Lloyd & Co.* as sureties has held that any loss, which may have been suffered by the plaintiffs owing to their inability to apply the proceeds of the goods stopped by *Lloyd & Co.* in satisfaction of their advance upon the bill of lading, can be made good by charging *Bloch* for the same in account. He says that the plaintiffs have actually debited *Bloch* in account with the amount of the advance. We have been unable to find in the evidence anything to support this statement. The plaintiffs' clerk *Anandrao Hari-shankar* states: "We have not got back the advances made on the 500 cases in suit." Similarly *Bloch* has not recovered the amount of his advance from *Millerson & Co.* He states that at the time when *Millerson & Co.* suspended payment, the amount due to him for advances was £7,640-14-0 including the advance of £255 against the bill of lading. He also says that he thinks he will be a loser on the whole business with *Millerson & Co.*; that although he had bought the estate (meaning thereby the margins payable to *Millerson & Co.* on realisation) it has turned out a failure. If, however, we assume that the plaintiffs have debited *Bloch* in account with the amount advanced against the bill of lading, there is nothing to show that they have recovered it or will recover it without objection from *Bloch*: it is not clear how *Bloch* is liable in respect of it under the terms of his agreement with the plaintiffs so long as they have not realised the goods against which the advances were made, for *Millerson & Co.* were to be responsible for any short fall on realisation in the first instance and *Bloch* was to be liable on their default for the same short fall. *Bloch* as a guarantor would be entitled to insist that the goods, the sale of which was contemplated, should be realised before he could be charged with liability. Again, even if *Bloch* is liable to the plaintiffs in respect of the advance, it does not appear to us that *Lloyd & Co.* would be entitled to any

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remedy against Bloch as they have not paid or performed all they were liable for as sureties. See Contract Act, section 140. The utmost benefit, we think, which the defendants are entitled to obtain from the position of Lloyd & Co. as sureties is the right to the security of the 250 boxes which they were willing, from the outset, should be received by the plaintiffs and which were, therefore, available for sale in or towards satisfaction of the advance made against the bill of lading. This, we think, follows from either section 139 or section 141 of the Contract Act. The plaintiffs by refusing to take delivery of the 250 boxes have omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission has resulted in loss the surety is discharged.

Now the value of the 250 cases not shipped by Lloyd & Co. was, according to the invoice, £104-15-10. The goods were sold during the progress of the suit in February 1909 for Rs. 1,625-8-0 from which Rs. 1,022-12-7 were deducted for customs duty, Port Trust, and King's warehouse charges, leaving a surplus of Rs. 602-11-5.

We do not think that it can be fairly assumed against the plaintiffs that the full invoice value would have been realised upon a forced sale of the 250 boxes in order to ease the surety. At the same time it may be that the sale in February 1909 is not a fair criterion of the price the goods would have realised if they had been sold at once after their arrival in May 1907. In the absence of evidence upon the point we allow Rs. 2,000 as the price which might have been realised at a forced sale in May 1907; and of that sum Rs. 602-11-5 is in the hands of the Collector of Customs.

It is obvious that this amount of Rs. 2,000 is not sufficient to discharge the claim of the plaintiffs for £255-5-2 and interest at 6 per cent. per annum and no offer or tender has been made by the defendants in respect of the plaintiffs' claim.

We, therefore, hold that the plaintiffs are entitled to recover from the defendants the difference between Rs. 2,000 and £255-5-2 calculated at 1s. 4d. per rupee with interest at 6 per cent. per annum and costs properly incurred in the realisation of

their security. They are, however, not entitled to recover such costs as are attributable to their unsuccessful contentions upon the issue of stoppage *in transitu*. These costs we assess at one-third in each Court.

We, therefore, reverse the decree of the lower Court and decree that the defendants do pay to the plaintiffs the sum of Rs. 1,828-14-0 with interest thereon at 6 per cent. per annum and two-thirds of the costs of this suit throughout. The respondents must assign to the appellants the Rs. 602-10-7 in the hands of the Collector of Customs.

Decree reversed.

Appellants' solicitors:—Messrs. *Craigie, Blunt & Caroe*.

Respondents' solicitors:—Messrs. *Crawford, Brown & Co.*

K. MCL. K.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877 AND IN THE
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IN THE MATTER OF THE SPECIFIC RELIEF ACT I OF 1877 AND IN THE
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*Specific Relief Act (I of 1877), section 45—General principle underlying interference by High Court—Municipal election petition—Jurisdiction and discretion of Chief Judge of Small Causes Court—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), sections * 33 and 34.*

A Municipal election petition having been lodged with the Chief Judge of the Small Causes Court, the latter unseated two of the successful candidates

* Section 33 (1) If the qualification of any person declared to be elected for being a Councillor is disputed, or if the validity of any election is questioned, whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the Municipal election roll may, at any time, within fifteen days after the result of the election has been declared, apply to the Chief Judge

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and found cause of objection against the candidate in whose favour were recorded "the next highest number of valid votes after those returned as

of the Small Cause Court. If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates who, although not declared elected, have, according to the results declared by the Commissioner under section 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate.

(2) If the said Chief Judge, after making such inquiry as he deems necessary, finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the declared result of the election. If he finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void. If he finds that the election is not a valid election he shall set it aside. In either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person or after all the persons who were returned as elected at the said election and against whose election no cause of objection is found, shall be deemed to have been elected.

(3) The said Chief Judge's order shall be conclusive.

(4) If he sets aside an election or if, when he declares a person who has been declared elected disqualified for being a Councillor, there is no other candidate who can be deemed to have been elected, proceedings for filling the vacancy or vacancies shall be taken under section 34.

(5) Every election not called in question in accordance with the foregoing provisions shall be deemed to have been to all intents a good and valid election.

Section 34. (1) If from any cause no Councillor is elected at any general election, the retiring Councillor or Councillors shall, if willing to serve, be deemed to be re-elected.

(2) If, in any such case the retiring Councillor is not willing to serve, or some of the retiring Councillors are willing to serve and some are not, or

if, in the case of an election to fill a casual vacancy, no Councillor is elected, or

if, in the case of any election, an insufficient number of Councillors are elected,

the Commissioner shall, without delay, inform the Corporation of the circumstances, and thereupon the Corporation, so far as it is constituted, may appoint a duly qualified person to fill the vacancy, or each vacancy, as the case may be, and, if the Corporation shall fail within fifteen days after receipt of such information to appoint a person as aforesaid, the Commissioner shall appoint another day for holding a fresh election.

(3) A fresh election held under this section shall be held subject in all respects to the same provisions as if it were an election to fill a casual vacancy.

elected." He declined to inquire further into the claims of any other candidate or to declare any other candidate elected, as, on his interpretation of section 33 (2) of the Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), he was not enabled to do so.

The two highest of the other unsuccessful candidates thereupon obtained rules against the Chief Judge under section 45 of the Specific Relief Act (I of 1877), to show cause why he should not proceed to declare them elected under section 33 (2) above mentioned.

Held, that the case fell within the general principle referred to in *Ex parte Milner*⁽¹⁾ that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would issue.

Section 33 having been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected, there was nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies. He should accordingly proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one qualified, or none qualified, proceedings for filling the vacancy or vacancies would have to be taken under section 34.

An application under section 33 (1) should name the persons whose election is objected to.

At the triennial general election of Municipal Councillors held in January 1910 fifteen candidates presented themselves to contest the eight vacancies in the Mandvi Ward. Eight candidates were declared by the Municipal Commissioner duly elected. A petition was shortly afterwards lodged with the Chief Judge of the Small Causes Court, under section 33 of the Municipal Act (Bom. Act III of 1888), praying for the setting aside of the election of these eight Councillors, or of one or more of them, on the ground of personation, coercion and undue influence. The inquiry resulted in the Chief Judge setting aside the election of two of the eight Councillors, namely, those standing 3rd and 6th respectively on the list returned by the Municipal Commissioner. Proceeding under the latter part of section 33 (2)

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(1) (1851) 15 Jur. 1037.

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of the Act, the Chief Judge held that only one candidate could in any event fulfil the conditions therein set out, and that, as objection existed against that candidate—in this case, number 9 on the list—, no other could be declared elected. The two vacancies thus caused were later filled by the Corporation under the provisions of section 34. On 13th June 1910 on the petition of Jaffer Jusub, who stood 10th on the list of candidates, Macleod, J., granted a rule *nisi* to issue to the Chief Judge to show cause why he should not proceed to direct under section 33 that the petitioner be deemed to have been duly elected. A similar rule was granted on the petition of Sharafally Mamooji, who stood 11th on the list. The two rules were consolidated and argued together.

Kemp (with him *Jardine*, Acting Advocate General) appeared for the Chief Judge of the Small Causes Court to show cause.

Section 45 of the Specific Relief Act provides that the Act required to be done must be clearly incumbent on the public officer. But here the Act is not in any event incumbent on the Chief Judge without further inquiry. The High Court has no power to interfere where the Judge has exercised his discretion in a matter within his jurisdiction. Even if it has the power it will not use it in such cases. It will only interfere where the Judge has wrongfully refused to perform his duty and not where he has gone wrong in performing it: see *Clifton v. Furley*⁽¹⁾, *In re Milner*⁽²⁾ and *The Queen v. The Judge of Pontypool County Court*⁽³⁾. This case must be distinguished from *In re Brighton Sewers Act*⁽⁴⁾, where the Judge refused to perform his duty. In *In re Bowen*⁽⁵⁾ it was held that the construction of a statute was within the jurisdiction of the County Court Judge, and even if his construction was erroneous a prohibition could not issue. Here the case is even stronger. Not only is the matter decided by the Chief Judge within his jurisdiction, but it is within his exclusive jurisdiction. The Act which created the right claimed by the petitioners also laid down their remedy. The whole point is fully dealt with

(1) (1861) 7 H. N. 783.

(3) (1894) 63 L. J. Q. B. 702.

(2) (1851) 15 Jur. 1037.

(4) (1882) 9 Q. B. D. 723.

(5) (1851) 15 Jur. 1196.

in *Bhaishankar v. Municipal Corporation of Bombay*⁽¹⁾. The judgment of Jenkins, C. J., in that case went much further than the actual decision, and is entirely against the petitioners. In any case the Chief Judge's construction of section 33 (2) is not only correct, but the only possible construction. Any other reading makes the word 'next' superfluous. Only one candidate can have the next highest number of valid votes, and the fact that there is cause of objection against him cannot release other candidates from fulfilling the first condition. The section does not enable, much less compel, the Chief Judge to go down the list till he comes to a candidate against whom no objection exists. The supposed intention of the legislature cannot be read in when the words are clear: *Vestry of St. John's, Hampstead v. Cotton*⁽²⁾. Lastly, the interference of the High Court where it lies, is purely discretionary, and many considerations arise as to the use of that discretion: see *The Queen v. Church Wardens of All Saints, Wigan*⁽³⁾. Such a rule, if granted, would lead in future to delay and uncertainty. In every election petition the Chief Judge must decide numerous points of law, and all these might be disputed in the same way. This is an indirect appeal, where no appeal lies.

Jardine, Acting Advocate General, appeared for the Municipal Commissioner.

The only interest of the Commissioner in this case is that the section should be read aright. The Court should bear in mind that the construction of the Act has not come before it as *res integra*, and even though mistaken should not be interfered with lightly, especially if a reasonable interpretation has been given. The petitioners here are in reality appealing. They have also been guilty of delay. Such an application as this ought to have been made at the earliest possible moment. Had the Corporation known of this petition, they would have refrained from filling the vacancies until they knew the result. But as it is, the vacancies have both been filled. Finally, the rule cannot be made absolute in its present form. The Court, if it decides to interfere, will have to give directions to the Chief Judge. Must the inquiry

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(1) (1907) 31 Bom. 604.

(2) (1886) 12 A. C. at p. 6.

(3) (1876) 1 A. C. at p. 620.

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be re-opened, or must he decide, as to the validity of votes and causes of objection, on such evidence only as has been adduced?

Setalvad, for the petitioners, in support of the rule.

There was no undue delay. The petitioners applied at the earliest opportunity,—the first day of term. The Corporation would probably have filled the vacancies in any case, as, otherwise after fifteen days they would have lost their right to do so under section 34. The cases cited with regard to the jurisdiction and discretion of the High Court to interfere are all in my favour. They all show that this Court will interfere where the lower Judge has refused to perform his duty. The duty of the Chief Judge in this case was, according to section 33 (2), to declare the petitioners elected. This he wrongfully refused to do. He had jurisdiction and refused to entertain it. The case of *Bhaishankar v. Municipal Corporation*⁽¹⁾ only decided that a suit would not lie in a matter in which the Chief Judge's order was conclusive. It has no application here. The Chief Judge's construction of the section is wrong. It is not necessary to give it such a narrow meaning even if such meaning is possible, and it was obviously not the intention of the legislature. The weakness of that reading is apparent when its alleged effect in restricting the Chief Judge to the consideration of one candidate could be nullified by the filing of a series of petitions. For I submit that it would be so nullified. The Chief Judge in his judgment has not found any cause of objection against the petitioners, and it is therefore clearly incumbent on him to declare them elected. The order should be that he should proceed according to law.

MACLEOD, J.:—In January last the triennial election of eight Councillors for B Ward Mandvi to the Municipal Corporation of the City of Bombay was held according to the provisions of the City of Bombay Municipal Act III of 1888. There were fifteen candidates and the result of the poll was duly declared by the Municipal Commissioner under section 28 (p) of the Act. Under section 28 (q) the first eight candidates were deemed to be elected.

A petition was then presented under section 33 of the Act by one Husenbhai Abdulabhai Laljee to the Chief Judge of the

⁽¹⁾ (1907) 31 Bom. 604.

Small Causes Court praying that the whole election or the election of the eight Councillors or of one or more of them might be set aside and a scrutiny held. The fifteen candidates and the Municipal Commissioner were made respondents. The Chief Judge held an inquiry and set aside the election of Lakhamsey Nappoo and Khimji Hirji Kayani who occupied the 3rd and 6th positions amongst the successful candidates.

The Chief Judge then came to the conclusion that under section 33 (2) he was only empowered to consider the claim of Fazulbhai Joomabhai Laljee, the candidate obtaining the next highest number of votes to the candidates returned as elected, to be held to be deemed to have been elected, but as he held that a valid cause of objection existed to Fazulbhai being declared elected he declined to direct that Fazulbhai should be deemed to be elected.

He further held that as there was no other candidate according to the interpretation he placed on the section who could be deemed to be elected, proceedings for filling up the two vacancies would have to be taken under section 34 of the Act.

Sarafally Mamooji, who stood tenth on the list as notified by the Commissioner, then presented a petition to this Court under section 45 of the Specific Relief Act asking for an order that the Chief Judge do proceed to direct under section 33 of the Bombay Municipal Act that the petitioner shall be deemed to have been duly elected and for such further and other relief as the circumstances of the case might require.

On the 18th June I granted a rule against the Chief Judge and directed that notice should be given to the Municipal Commissioner and also to Sir Jansetji Jeejeebhai and Dr. Rajabally V. Patell who had been appointed by the Municipal Corporation purporting to act under section 34 to fill the vacancies caused by the decision of the Chief Judge. The rule was argued before me on the 23rd June. Mr. K. Kemp appeared to show cause on behalf of the Chief Judge; Mr. Jardine, Acting Advocate General, appeared to watch the proceedings on behalf of the Municipal Commissioner while the two gentlemen above mentioned had intimated to the petitioner that they did not intend to take any part in the proceedings.

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It was first contended by Mr. Kemp that the Court had no jurisdiction to entertain the petitioner's application. Now under section 45 of the Specific Relief Act the High Court of Bombay may make an order requiring any specific act to be done or forbore within the local limits of its Ordinary Original Civil Jurisdiction by any inferior Court of Judicature, provided that (a) an application for such order be made by some person whose property franchise or personal right would be injured by the forbearing or doing (as the case may be) of such specific act and (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such Court in its public character. Rule 530 of the Bombay High Court Rules prescribes the manner in which the application should be made. The Small Causes Court is an inferior Court of Judicature within the local limits of its Ordinary Original Civil Jurisdiction, and the petitioner's franchise has been injured by the Chief Judge refusing to consider his claim to be deemed to have been elected. Therefore if I am of opinion that it was clearly incumbent on the Chief Judge under section 33 to consider the petitioner's claim, I have jurisdiction to direct the Chief Judge to do so.

I may here deal with the contention that the petitioner has been guilty of delay so as to disentitle him to relief.

The Chief Judge delivered his judgment on the 13th April. The petitioner obtained a certified copy of the judgment on the 23rd April. The High Court vacation had then commenced and the petition was presented on the first day the Court sat after the vacation. It is suggested that it should have been presented during the vacation, but the petitioner was under no obligation to do so, and I think he was perfectly justified in waiting until the Court re-opened after the vacation. Then Mr. Kemp urged that the Chief Judge had exercised his discretion in a matter wholly and exclusively within his jurisdiction and that acting on well-known principles this Court would not interfere. But in this case it is not a question of discretion, the Chief Judge has said: "As I read section 33 the legislature has given me no power to consider the claim of any of the remaining candidates to fill these two

vacancies except the claim of No. 9." If he had said, "I have the power but I decline to exercise it in favour of any of the unsuccessful candidates," his decision would have been conclusive.

This case falls within the general principle referred to in *Ex parte Milner*⁽¹⁾ that where an inferior tribunal improperly refuses to enter upon a complaint, a mandamus will issue. And see *The Queen v. The Judge of the Pontypool County Court*⁽²⁾, where the High Court refused to interfere with the decisions of the County Court Judge, as, in the words of Wright, J., "he had not really declined jurisdiction. He might or might not have made a mistake but it could not be said he had refused to entertain case."

Lastly, it was suggested that even if I differed from the Chief Judge I should not give directions on the ground of public policy as the success of the petitioner in this case might lead to applications of a frivolous nature being made to this Court. That may be a reason why this Court will not interfere when the lower Court has exercised its discretion but when jurisdiction has been declined it is a matter of public policy that a subject should not be lightly deprived of a franchise to which he is entitled by law.

I now come to the merits of the case. What are the powers and duties of the Chief Judge under section 33 of the Bombay Municipal Act which has been materially altered by Bombay Act V of 1905? Within fifteen days after the result of an election being declared any person enrolled in the Municipal election roll may apply to the Chief Judge (1) if the qualification of any person declared to be elected for being a Councillor is disputed or (2) if the validity of any election is questioned for certain reasons mentioned or for any other cause. It is open to argument whether the word 'election' means the election proceedings as a whole, or the election of an individual candidate. This question was discussed by Sir Lawrence Jenkins, C J., in *Bhaishankar v. Municipal Corporation of Bombay*⁽³⁾ but in the

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(2) (1894) 63 L. J. Q. B. 702

(3) (1907) 31 Bom. 604.

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opinion of the learned Chief Justice it mattered little which view prevailed. I should be inclined to think that neither view is wholly correct.

An objection to the election proceedings as a whole must include an objection to each of the individual candidates. An objection to the election of a particular candidate may involve an inquiry into the whole of the election proceedings as regards that candidate. What does seem clear from the wording of sub-section (2) is that an application under sub-section (1) should name the persons whose election is objected to.

The powers of the Chief Judge under sub-section (2) were changed by the amending Act and in order to prescribe the procedure to be followed in consequence of that change the following words were added to sub-section (1): "If the application is for a declaration that any particular candidate shall be deemed to have been elected, the applicant shall make parties to his application all candidates, who, although not declared elected, have, according to the results declared by the Commissioner under section 32, a greater number of votes than the said candidate, and proceed against them in the same manner as against the said candidate."

It was open, therefore, to the applicant in the Small Causes Court to ask for a declaration that No. 15, for instance, should be deemed to have been elected, in which case he was bound to make Nos. 9 to 14 parties to his application. I do not understand, however, the last words of the sub-section 'as against the said candidate.' The applicant would not be proceeding against the particular candidate he wished to be declared elected, and it would seem more in agreement with the context if the sub-section ended as follows:—'as against the successful candidate or candidates the validity of whose election is being questioned.'

Sub-section (2) enacts what the Chief Judge is to do when an application is made under sub-section (1). He has to make such inquiry as he may deem necessary and—

1. If he finds that the election was a valid election and that the person whose election is objected to is not disqualified he shall confirm the result of the election.

2. If the Chief Judge finds that the person whose election is objected to is disqualified for being a Councillor he shall declare such person's election null and void.

3. If the Chief Judge finds that the election is not a valid election he shall set it aside

The words "so far as concerns the person whose election is objected to" appearing in the Act before the amendment have now been omitted. It may be they were considered superfluous, but whether the Chief Judge declares a person's election null and void on the ground that he is disqualified or sets aside an election as not valid, in either case he shall direct that the candidate, if any, in whose favour the next highest number of valid votes is recorded after the said person or after all the persons who were returned as elected at the election, and against whose election no cause of objection is found shall be deemed to have been elected.

The Chief Judge dealing with this part of sub-section (2) says in his judgment :

"The last part of clause 2 of section 33 seems to contemplate only one candidate coming in in the event of one or more of the successful candidates being unseated by the Court, that one candidate being the gentleman with the next highest number of votes to the candidates returned as elected provided no cause of objection exists against him. Hence if the election of the whole eight successful candidates were set aside the Court would only have power to declare the ninth candidate elected in place of the eight returned candidates and if any cause of objection existed as to him nobody could be declared elected."

Later on he says:

"As the elections of the third and sixth respondents have been set aside the question to be considered is whether any cause of objection can be urged against the ninth respondent who in the ordinary course and who alone under section 33 (2) can be declared elected in place of the unseated candidates."

Whatever the section may contemplate, the Court must give effect to its plain grammatical meaning and, with all due deference to the learned Chief Judge, that meaning is perfectly clear. Under section 33 (2) of the Act as it stood before it was amended by Bombay Act V of 1905 the Chief Judge, if he set aside an election, had no power to fill the vacancy so created. It was

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only in the case of a person's election being held null and void on the ground that he was disqualified for being a Councillor that the Chief Judge could direct that the candidate, if any, with the next highest number of votes after the person disqualified or after all the persons who were returned as elected should be deemed to be elected. I am clearly of opinion that under that section the Chief Judge had power to fill up any number of vacancies caused by the election of candidates being declared null and void so far as the number of unsuccessful candidates allowed in order of votes obtained by them. However that may be, the amendments, introduced by Act V of 1905, leave no room for ambiguity. It is not the candidate with the next highest number of votes whom the Chief Judge shall declare to be deemed to be elected but the candidate with the next highest number of valid votes and against whose election no cause of objection is found. The Chief Judge in stating what the section in his opinion contemplated has omitted to notice the word 'valid.' No doubt the Chief Judge would be entitled to presume that all the votes in favour of a candidate as declared by the Commissioner were valid but if a vacancy has to be filled all the unsuccessful candidates are open to attack and the last on the list may prove to be the one with the next highest number of valid votes.

The object of the latter portion of sub-section (1) added as above mentioned by Bombay Act V of 1905 now becomes clear. The change in sub-section (2) has enabled an applicant to apply to the Chief Judge for a declaration that any of the unsuccessful candidates should be deemed to be elected and if the applicant in this case had applied for a declaration in favour of No. 15 he was bound, as I have pointed out above, by sub-section (1) to make Nos. 9 to 14 parties of his application. As far as I can gather no such declaration was asked for but all the candidates were made parties to the application. If the Chief Judge could only consider whether No. 9 should be deemed to be elected or not, the latter portion of sub-section (1) expressly added by the amending Act would be meaningless.

Then is there anything in the section which can be held to limit the power of the Chief Judge to filling up one vacancy

only, when he has set aside the election of more than one of the successful candidates? Under section 13 of the General Clauses Act words in the singular shall include the plural and *vice versa* provided there is nothing repugnant in the subject or context.

The section has been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected; therefore I see nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was suggested that the Chief Judge might have to direct that candidates with a very small number of votes should be deemed to have been elected. That is a matter for the legislature and not for the Court, but I may point out that it would be possible for this to occur even if the view of the Chief Judge was correct and only the claim of the next man out could be considered.

In my opinion, therefore, it was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies.

I direct accordingly that the Chief Judge do proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection is found should be declared to be deemed to be elected. If only one qualifies, or none qualifies, proceedings for filling the vacancy or vacancies will have to be taken under section 34.

My decision in no way interferes with the discretion of the learned Chief Judge. It does not lie within his discretion to refuse to exercise duties clearly imposed upon him by statute when by such refusal the franchise of some person has been injured.

Attorneys for the petitioner :—Messrs. *Thakurdas & Co.*

Attorneys for the Municipal Commissioner.—Messrs. *Crawford, Brown & Co.*

Attorneys for the Chief Judge :—Messrs. *Little & Co.*

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APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice

1910. MANCHAND PANACHAND GUJAR (ORIGINAL DEFENDANT 3), APPELLANT,
 April 14. v. KESARI LOM KHUPCHAND AND ANOTHER (ORIGINAL PLAINTIFFS),
 RESPONDENTS.*

Limitation Act (XV of 1877), section 8, Schedule II, article 17, Explanation 1—Limitation Act (IX of 1908), section 1—Minor decree-holders—Applications for execution by guardian—Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge to the judgment-debtor in respect of the judgment-debt

Two minor sisters, who were born in the years 1881 and 1887, obtained a decree against the defendants in May 1900. The minor decree-holders were represented by a guardian appointed by the Court. The said decree was confirmed by the High Court in appeal in March 1901. Subsequently the guardian presented applications for the execution of the decree in 1904, 1905 and 1906, and while the last application was pending the guardian died. Thereupon the decree-holders presented an application for execution as majors in 1908. The defendants contended that as the elder decree-holder had attained majority, the application by the guardian was, as to her, unauthorized and the execution of the decree was barred as against her. It was further contended that as the elder decree-holder could from the time of her attaining majority make an application and give a good discharge to the judgment-debtor for the decretal-debt without the concurrence of the minor, time had, therefore, run against both under section 8 of the Limitation Act (XV of 1877) or section 7 of the Limitation Act (IX of 1908).

Held that by reason of the first explanation of article 179 of the Limitation Act (XV of 1877) an application made by a representative of one of joint decree-holders takes effect in favour of all. Therefore, though the elder decree-holder had attained majority, the applications made by the guardian as the next friend of the minor decree-holder took effect in favour of both.

Held, further, that the contention under section 8 of the Limitation Act of 1877 or section 7 of the Limitation Act of 1908 was inconsistent with the decisions in *Govindram v. Tatia*⁽¹⁾ and *Zamir Hasan v. Sundar*⁽²⁾, the applicability of which had not ceased owing to any change in the words of section 7 of the Limitation Act of 1908.

FIRST appeal from the decision of V. N. Rahurkar, First Class Subordinate Judge of Satara, in an execution proceeding.

* First Appeal No. 102 of 1909.

(1) (1895) 20 Bom. 388.

(2) (1899) 22 All. 190.

The facts of the case were as under :—

Two minor Hindu sisters, Kesari and Thaku, who were born in the years 1881 and 1887 respectively, obtained a decree against three defendants in the Court of the First Class Subordinate Judge of Satara on the 1st May 1900. The minors were represented by one Balaram, a guardian appointed by the District Court of Satara, and he having subsequently died his brother Ramji assumed the management of the minor's estate *suo motu*. The said decree was confirmed by the High Court in March 1901. In the years 1904, 1905 and 1906 the guardian presented applications for the execution of the decree, and while the last application was pending the guardian Ramji died. Thereupon, in the year 1908 the two decree-holders, Kesari and Thaku, filed the present application for execution as majors. At the time of the application the ages of Kesari and Thaku were 27 and 21 years respectively. Kesari being a major in the years 1904, 1905 and 1906 when the guardian presented applications for the execution of the decree, the defendants contended that those applications were made by an unauthorized person, therefore, they did not avail the plaintiffs and owing to this reason the present application was beyond time.

The Subordinate Judge overruled the defendants' objection and allowed execution to proceed for the following reason :—

Kesari and Thaku were joint decree-holders. Under section 231 of the Civil Procedure Code of 1882 Thaku could apply for the benefit of herself and her sister. She was a minor. Section 7 of the Limitation of 1877 or of 1908 would save the bar of limitation even if there had been no previous applications at all (20 Bom 383; 6 Bombay Law Reporter 647). In this case there were previous applications and the present application which was made within three years from the attaining of majority by Thaku cannot be barred.

Defendant 3 preferred an appeal.

N. M. Putvardhan for the appellant (defendant 3).—

Kesari had attained majority when the applications for execution were made by the guardian. He had therefore no authority to make the applications. Those applications were therefore ineffectual and the present application which is made by Kesari and Thaku is barred by limitation. Further, Kesari having attained majority could give a valid discharge to the judgment-debtor during the

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minority of Thaku under section 231 of the Civil Procedure Code of 1882. Therefore under section 8 of the Limitation Act of 1877 time began to run against Kesari and Thaku both. Supposing they were not joint creditors or claimants under that section, still under the provisions of section 7 of the Limitation Act of 1908 there can be no doubt as to Kesari's right to grant a discharge to the judgment-debtor and the bar of limitation is not saved.

K. N. Koyaji for the respondents (plaintiffs).—

The decree to be executed was a joint decree, therefore, an application for execution made by one joint decree-holder would take effect in favour of both under the first explanation to article 179 of the Limitation of 1877: see the Full Bench ruling of the Allahabad High Court in *Zamir Hasan v. Sundar*⁽¹⁾. With respect to the right of Kesari to give discharge to the judgment-debtor during the minority of Thaku, we contend that the 'discharge' mentioned in section 8 of the Limitation Act of 1877 refers to a discharge which is wholly the act of the party giving the discharge. Here the judgment-creditors were sisters and neither could give a discharge on behalf of the other. The discharge under section 231 of the Civil Procedure Code of 1882 is a power exercised by the Court and not by the party: *Zamir Hasan v. Sundar*⁽¹⁾, *Govindram v. Tutia*⁽²⁾. The change of language in section 7 of the Limitation Act of 1908 has made no difference with regard to the question of discharge. Either section contemplates a case like that of a manager capable of giving a discharge on behalf of the whole joint family. We therefore submit that our present application is within time.

SCOTT, C. J.:—It is contended in this appeal that the learned Subordinate Judge was wrong in holding that an application for execution of a decree which had been passed in favour of two Hindu females during their minority, was not barred.

The application was made in 1908 and at that date the age of the elder decree-holder was 27 and that of the younger decree-holder 21. There had previously been several applications for

(1) (1899) 22 All. 199.

(2) (1895) 20 Bom. 388.

the execution of the decree, for, Ramji, the brother of the deceased guardian of the minors, had in 1904, 1905 and 1906 presented different darkhasts purporting to act as the guardian of both the decree-holders.

Now as a guardian had been appointed for them they did not attain the age of majority until 21 and at the time of the applications in 1904, 1905 and 1906 the younger decree-holder was still a minor.

It is contended that the elder had attained the age of majority and that, therefore, the execution of the decree must be barred as regards her. It is, however, pointed out by the Full Bench in *Zamir Hasan v. Sundar*⁽¹⁾, that by reason of the first explanation of article 179 of the Limitation Act an application, made by a representative of one of joint decree-holders, takes effect in favour of all; therefore, though the elder decree-holder Kesari had attained majority the applications made by Ramji as next friend of Thaku took effect in favour of both.

It is also argued that under section 8 of the Limitation Act of 1877, or, at all events under section 7 of the Limitation Act of 1908, the elder decree-holder Kesari could, from the time of her attainment of majority, make an application under section 231 of the Code of Civil Procedure of 1882 and give a good discharge to the judgment-debtor in respect of the judgment-debt.

That contention, however, is inconsistent with the decisions in *Govindram v. Tatra*⁽²⁾ and *Zamir Hasan v. Sundar*⁽¹⁾, and the applicability of those cases has not ceased owing to any change in the words of section 7 of the Limitation Act of 1908.

I, therefore, think that the learned Judge in the lower Court came to the right conclusion, and I dismiss this appeal with costs.

Appeal dismissed.

G. B. R.

(1) (1899) 22 All. 199.

(2) (1895) 20 Bom. 383.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr Justice Batchelor.

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BAI SHRI VAKTUBA (ORIGINAL DEFENDANT 1), APPELLANT, v. THAKORE AGARSINGHJI RAISINGHJI (ORIGINAL PLAINTIFF), RESPONDENT, AND RANSINGHJI AGARSINGHJI (ORIGINAL DEFENDANT 2), APPELLANT, v. THAKORE AGARSINGHJI RAISINGHJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Specific Relief Act (I of 1877), section 42—Civil Procedure Code (Act VIII of 1859), section 15—15 and 16 Vic., c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.

A Talukdar-plaintiff brought a suit for a declaration that defendant 2, a minor, was not his son and that he was not born to the plaintiff's wife, defendant 1, and for an injunction restraining defendant 1 from proclaiming to the world that defendant 2 was plaintiff's son and from claiming maintenance for him as such son. The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877) and that it was premature.

Held, that the suit was maintainable, it being within the provisions of section 42 of the Specific Relief Act (I of 1877).

Held, further, that in the interests of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay, and when the controversy had once been brought to trial the decision should ordinarily follow the usual course.

Yool v. Ewing(1) distinguished.

FIRST appeal from the decision of Chandulal Mathuradas, First Class Subordinate Judge of Surat, in Suit No. 503 of 1902.

The plaintiff, who was the Talukdar of the Guaf State in the Dhandhuka Taluka, sued for a declaration that the minor defendant 2 was not his son and that he was not born to his wife, defendant 1, and also to obtain a perpetual injunction restraining the defendant 1 from proclaiming to the world that defendant 2 was his son, from establishing that the said defendant was his natural born son and from claiming maintenance from the plaintiff as such son. The plaintiff alleged that he was married to defendant 1 about ten or twelve years before the suit,

* Joint Appeals Nos. 46 and 57 of 1906.

(1) (1903) Ir. Rep. 1 Ch. 434.

that thereafter she lived with the plaintiff as his lawfully wedded wife but as no son was born to her on account of ill-health and other natural defects, the plaintiff married a second wife, that defendant 1, thereupon, with a view to set up a supposititious son, left the plaintiff and went to live with her father in the village of Vadgaum in Cambay and that in a previous proceeding instituted by the plaintiff against defendant 1 in the Court at Cambay she urged that a son was born to her, hence the present suit.

Defendant 1 answered that the suit was unsustainable under the provisions of the Specific Relief Act, that the plaintiff had filed a similar suit in the Court at Cambay and he withdrew it without liberty to file a fresh suit, therefore, the present suit was opposed to the provisions of sections 12 and 373 of the Civil Procedure Code of 1882, that she had no natural defects and she all along served the plaintiff as his wife, that as she was expecting her confinement she went to live with her father and gave birth to defendant 2 on the 1st September 1901 at her maternal uncle's house, that defendant 2 was plaintiff's son and that no cause of action had accrued to the plaintiff.

The Subordinate Judge found that the plaintiff's suit was not opposed either to the provisions of section 42 of the Specific Relief Act or to the provisions of sections 12 and 373 of the Civil Procedure Code of 1882. He, therefore, allowed the claim.

Defendants preferred joint appeals Nos. 46 and 57 of 1906.

Raikes, with *T. R. Desai*, appeared for the appellant (defendant 2) in appeal No. 57 of 1906.

We contend that a suit like the present cannot lie in a Civil Court. The plaintiff-Talukdar claimed a declaration that the infant-defendant is not his son, that his wife was not pregnant and that no son was born to her. The lower Court erred in making the declaration relying on illustration (a) to section 42 of the Specific Relief Act. We submit that (1) such a declaration cannot be made under section 42 and that, (2) even if it can be made the lower Court erred in the exercise of its discretion in granting the relief against the infant.

First, because there is no denial by the infant-defendant of any right or character of the plaintiff, nor is he interested in

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denying the plaintiff's title to such character or rights because his own rights have not yet come into existence. The plaintiff, as Talukdar, is entitled to enjoy his estate for life and the fact of the infant's existence is no denial of the plaintiff's rights during his life-time. The infant has not claimed anything against the plaintiff, therefore section 42 of the Specific Relief Act has no application. Section 15 of the Civil Procedure Code of 1859 as interpreted by the High Courts and the Privy Council supports our contention: *Kathama Nutchiar v. Dorasinga Tever*⁽¹⁾, *Sheo Singh Rai v. Mussumat Dakho*⁽²⁾. The English Statute on which section 42 of the Specific Relief Act is based is in the same direction: 15 and 16 Vic., c. 86, s. 50. These authorities show that the plaintiff is not entitled to the relief which has been granted to him. A declaratory decree should not be made unless there is a right to some consequential relief which, if asked for, might have been granted: *Fischer v. Secretary of State for India*⁽³⁾.

Secondly, even if such a case falls under section 42 of the Specific Relief Act, the present is not the case in which the Court should exercise its discretion in plaintiff's favour: *Yool v. Lwing*⁽⁴⁾, *North-Eastern Marine Engineering Company v. Leeds Forge Company*⁽⁵⁾. The interest of the minor defendant should not be prejudiced by deciding a question which will arise in the future. It would not be necessary to decide at this stage intricate questions when no immediate effect can be given to the decision and when the postponement of the decision will not prejudice the plaintiff's rights in any way: *Hunabutti Kerain v. Ishri Dutt Koer*⁽⁶⁾. English Courts always keep back the decision in such cases. On the merits we submit that the evidence in the case does not justify the finding in plaintiff's favour. Direct and circumstantial evidence of a strong character is required in a case of this nature.

Inverarity, Branson and B. G. Desai, with *M. N. Mehta* and *N. K. Mehta*, appeared for the respondent (plaintiff).

The present suit is maintainable under section 9 of the Civil Procedure Code of 1908 and section 42 of the Specific Relief Act.

(1) (1875) L. R. 2 I. A. 169.

(4) (1903) Ir. Rep 1 Ch. 434.

(2) (1878) L. R. 5 I. A. 87.

(5) (1906) 1 Ch. 325.

(3) (1883) L. R. 26 I. A. 16 at p. 27.

(6) (1879) 5 Cal. 512.

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Section 9 of the Civil Procedure Code allows all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. There can be no doubt of the civil nature of the present suit and there is no law which either expressly or impliedly bars such a suit: *Aunjona Dasi v. Prahlad Chandra Ghose*⁽¹⁾, *Mir Azmat Ali v. Mahmud-Ul-Nissa*⁽²⁾. The Talukdari estate of which the plaintiff is the owner is impartible and inalienable without the sanction of Government under section 31, clause 1 of the Gujarat Talukdars' Act, and it descends according to the rule of primogeniture. It has been held in *Himmatsing v. Ganpatsing*⁽³⁾ that although the son of a Talukdar is debarred from claiming a partition of the estate in his father's life-time, he may sue for maintenance out of the estate. See also *Ramchandra Sakham Vagh v. Sakham Gopal Vagh*⁽⁴⁾. Supposing that the defendant is a legitimate son, he would be entitled to an interest in the estate and so he would be interested in denying the plaintiff's right being free from his claim to maintenance out of the estate. Therefore the present suit clearly falls under section 42, illustration (f) of the Specific Relief Act. The rulings in *Rajah Nilmony Singh v. Kally Churn Battacharjee*⁽⁵⁾ and *Kathama Natchiar v. Dorasinga Tever*⁽⁶⁾ were not decided under section 42 of the Specific Relief Act. They went upon the old Chancery Practice Cases. The law has been altered in this respect; see Daniel's Practice, pp. 630, 631. No action or pleading is now open to the objection that a mere declaratory judgment order is sought thereby and the Court is empowered to make a binding declaration of rights whether any consequential relief is or could be claimed or not. The power thus given is discretionary and whether the Court will exercise its discretion depends on the circumstances of the particular case: *Ellis v. Duke of Bedford*⁽⁷⁾, *West v. Lord Sackville*⁽⁸⁾.

Under the Judicature Act a suit can be maintained for perpetuating testimony, Order 37, Rule 35. No such procedure is provided in India and so it becomes necessary to file suits of this

(1) (1870) 6 Beng. L. R. 243.

(5) (1874) L. R. 2 I. A. 83.

(2) (1897) 20 All. 96.

(6) (1875) L. R. 2 I. A. 169.

(3) (1875) 12 Bom. H. C. R. 94.

(7) (1899) 1 Ch. 494 at p. 499.

(4) (1877) 2 Bom. 346.

(8) (1906) 2 Ch. 325.

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nature while facts are fresh, witnesses are alive and are in a position to depose to facts of a recent date as pointed out by the Privy Council in *Chandrasangji v Mohansangji*⁽¹⁾. The decision in *Fool v. Ewing*⁽²⁾ is not applicable to the present case. In that case there was no question relating to a right to an impartible estate and the rules and orders relied on in that case were not similar to section 42 of the Specific Relief Act.

SCOTT, C. J. :—The plaintiff claims in this suit a declaration that the second defendant is not his son and that he was not born to the first defendant and for an injunction restraining the defendant 1 from proclaiming to the world that the defendant 2 is plaintiff's son and from claiming maintenance for him as such son.

The plaintiff is a Talukdar and the first defendant is his wife, who alleges that, after leaving the plaintiff's house, a son was born to her who had been begotten by the plaintiff.

No claim for maintenance has as yet been made on behalf of the second defendant. He is an infant less than two years of age and neither he nor anyone on his behalf has set up any claim by him as heir to the estate of the plaintiff. The Talukdari estate of which the plaintiff is owner descends according to the rule of primogeniture, it is impartible and inalienable without the consent of Government and it has been held in this Court that although the son of a Talukdar is debarred from claiming a partition of the estate in his father's life-time, he may sue for maintenance out of the estate, *Himmatsing v. Ganpatsing*⁽³⁾.

The question which arises at the outset is whether such a suit as this will lie. It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute.

(1) (1906) 30 Bom. 523.

(2) (1904) Ir. Rep. 1 Ch. 434.

(3) (1875) 12 Bom. H. C. R. 94.

In *Kathama Natchiar v. Dorasinga Tever*⁽¹⁾ the Judicial Committee state:—"They at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th section of the Code of Civil Procedure of 1859, the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that, and suggested that the power was possessed by the Courts in the Mofussil, before the Code of Procedure was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the section being.—'No suit shall be open to an objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief.' Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause." It was held by their Lordships in the case from which the above quotation is drawn, that the application of section 15 of the Code of Procedure of 1859 must be governed by the same principles as those upon which the Court of Chancery proceeded in exercising the power conferred by 15 and 16 Vic., c. 86, s. 50, with such slight modifications as might be required by the different circumstances of India and by the different constitution of the Courts in that country, and that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court; or under special circumstances as to jurisdiction in some other Court.

There can, we think, be no doubt that if the law as to declaratory decrees were still governed by section 15 of Act of 1859, this

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suit would not be maintainable, having regard to the decisions in England under 15 and 16 Vic, c. 86, s. 50, and the opinion expressed by the Judicial Committee in the case above referred to. The law, however, is now governed by section 42 of the Specific Relief Act of 1877, which provides as follows :—

“Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so.”

On behalf of the defendant, reliance is placed upon a passage in the judgment of the Judicial Committee in *Fischer v. Secretary of State for India in Council*⁽¹⁾ to the effect that there can be no doubt as to the origin and purpose of section 42 that it was intended to introduce the provisions of section 50 of the Chancery Procedure Act of 1852 (15 and 16 Vic, c. 86) as interpreted by the Judicial decisions and that before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. The Judicial Committee however in that case were not considering exhaustively the different cases in which declaratory decrees might be passed.

It is contended on behalf of the plaintiff that he is a person entitled to a right to his Talukdari estate free from any claim to maintenance by or on behalf of the second defendant, and therefore that the Court may, in its discretion, make a declaration in this suit that he is so entitled.

There can, we think, be no doubt that the assertion which has been proved to have been made by the father of the first defendant with reference to the paternity of the second defendant, may lead to serious consequences from the point of view of

(1) (1893) L. R. 26 L. A. 27.

the plaintiff. It is well known that disputes often arise as to the true paternity of boys who are put forward as heirs to Talukdari estates.¹ The prevalence of such disputes is illustrated by the letter of the Collector of Ahmedabad of the 9th of December 1897, Exhibit 131 in this case, where he calls attention to the desirability of Talukdars having their wives submitted to medical examination, when it is alleged that they are pregnant. It is not that such boys are often objected to as being bastards but as being supposititious sons of women who have never born sons.

As a particular instance of the evil now under discussion, we may refer to a passage in the judgment of the Judicial Committee in *Chandrasangji v. Mohansangji*⁽¹⁾, where, with reference to a case of an alleged supposititious child of a Talukdar, their Lordships observe:—"The extraordinary length of time which was allowed to elapse after the 14th May 1883, the date upon which everything turns, and the 12th December 1894, when the present suit was filed, is also a circumstance very adverse to the respondent. During all that interval, with the exception of a part of 1893 and 1894, when negotiations for a compromise were in progress, there was never a time at which proper steps might not, and ought not, to have been taken to secure a full trial of the question in issue; and that question is one which, from its nature, specially required to be disposed of while the facts were fresh."

It appears to us that having regard to the really serious nature of the question with which the plaintiff was faced as soon as the assertion was made that a son, not admitted by him, had been born to his wife, his contention as to his right under section 42 of the Specific Relief Act is perfectly reasonable and we hold that this suit is a suit which falls within the purview of section 42.

The question then arises is whether the Court below in entertaining the suit has exercised a proper discretion in the matter. On the one hand, it is extremely desirable that all evidence which may be forthcoming with reference to the birth and paternity of

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(1) (1906) 30 Bom. 523 at p 533.

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the second defendant should be taken while it is still available. On the other hand, we have to bear in mind the considerations stated as follows by Mr. Justice Joyce in *N. E. Marine Engineering Co. v. Leeds Forge Co.*⁽¹⁾. "In simple cases, the mere fact that A is supposed to contemplate the bringing of an action against B, or that A may have stated that he has grounds for such an action, does not entitle B to institute an action against A to have it declared that A has not a good cause of action against B, I think that is so whether the result depends merely upon questions of law or upon facts, as to which there would, or might, be a conflict of evidence and a protracted trial. Ordinarily, an intending plaintiff may postpone his action as long as he pleases at the risk of finding himself ultimately barred by some Statute of Limitations, and he may choose his own time for commencing proceedings. He is entitled to wait until he has collected the necessary evidence, or has made such inquiries as he thinks fit, or has obtained the requisite funds, or what not."

We do not think that in the present suit these considerations are of much force. For it is not the case here that the plaintiff is seeking prematurely to force his opponent's hand; on the contrary the plaintiff's own hand has been forced by the open assertion of a definite claim on behalf of the minor defendant, a claim which the plaintiff is entitled to repel now when the material evidence is obtainable. To hold that, although the suit is maintainable, the Court below wrongly exercised its discretion in granting the declaration sought amounts for practical purposes to holding that the plaintiff, openly threatened with this serious claim, is condemned to inactivity for, it may be, 20 or 30 years, leaving it to the claimant to file his suit at such time as most assists him in taking the plaintiff at a disadvantage. The remarks of the Judicial Committee which we have already quoted indicate how prejudicial to the plaintiff's cause such inactivity would be, and it is plain that every day during which the plaintiff remained quiescent under an adverse claim of this character, would strengthen the case against him.

We have not overlooked the fact that the second defendant is an infant of very tender years who was represented only by the Official Nazir of the Court as his guardian, and we have considered whether it would not be best to reverse the decree under appeal and stay the suit with liberty to the plaintiff to apply for its removal from the Stayed List in the event of the second defendant setting up any claim based upon the allegation that he is the plaintiff's son. But having regard to all the circumstances and being of opinion that the lower Court has come to a correct conclusion upon the question of fact we think that our proper course is to affirm the decree. It is no longer the practice to stay suits against infants until they have attained full age, as it is generally considered that an infant's case can be sufficiently placed before the Court by a duly constituted guardian. Such a guardian we have here, and though the whole of the case for the defence is that which was put forward by the first defendant, that is a circumstance of no moment to the present argument. From the very nature of the case the claim on behalf of the infant had to be put forward during his infancy, and the person best qualified to put it forward was the first defendant. In reality indeed it is as much her claim as his, and the record satisfies us that she has supported her pretensions with all the evidence procurable in that behalf. The plaintiff, being entitled to bring this suit, is entitled on the evidence to the decree made in his favour, and his rights are not to be curtailed by reason of the fact that the false claim made against him had to be made while the second defendant was yet an infant. Technically the infant has been duly represented; substantially his case has been put before the Court fully and completely with all, even more than all—the evidence which could honestly be called in aid of it. In the interests of justice it is of the highest importance that claims of this character should be investigated and decided without unnecessary delay, and when the controversy has once been brought to trial the decision should ordinarily follow in the usual course. We do not find in this case sufficient reasons for upsetting the decision come to and suspending the whole dispute indefinitely.

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Much reliance has been placed by the defendant's Counsel upon the case of *Yool v. Ewing*⁽¹⁾. That, however, was a case in which no question arose as to the right of inheritance to an impartible and inalienable estate and the words of the Rules and Orders relied upon by the Master of the Rolls as indicating that no suit for a declaration of bastardy could be maintained, are not identical with the terms of section 42 of the Specific Relief Act.

We affirm the decree of the lower Court and dismiss the appeal with costs.

We order the appellant to pay the Court fees which would have been paid by him if he had not been permitted to appeal as a *pauper*.

Decree affirmed.

G. B. R.

(1) (1904) Ir. Rep. 1 Ch. 434.

APPELLATE CIVIL.

Before Mr. Justice Chandamkar and Mr. Justice Heaton.

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July 8.

NANABHAI BAJIBHAI PATEL (ORIGINAL DEFENDANT), APPELLANT,
v. THE COLLECTOR OF KAIRA AND OTHER LEGAL REPRESENTATIVES
OF INAMDAR PANDURANG SADASHIV (ORIGINAL PLAINTIFF),
RESPONDENT.*

*Bombay Land Revenue Code (Bombay Act V of 1879), sections 3 (11) and 217†—
Survey settlement introduced into Inam village—Inamdar's name entered as
Khatedar—Permanent tenant of the Inamdar before the settlement—Inam-
dar's right to enhance rent.*

Section 217 of the Bombay Land Revenue Code (Bombay Act V of 1879) is not restricted in its application to registered occupants only: it invests "the holders of all lands" in alienated villages with the same rights and imposes

* Second Appeal No. 186 of 1905.

† The sections run as follows:—

Section 3 (11)—"holder" or "landholder" signifies the person in whom a right to hold land is vested, whether solely on his own account, or wholly or partly in trust.

upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages have.

The term "holder" as defined in clause 11, section 3 of the Land Revenue Code, is wide enough to include even a tenant who has entered into possession under an occupant

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SECOND appeal from the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad with appellate powers, reversing the decree passed by M. N. Choksi, Subordinate Judge at Nadiad.

Suit by an Inamdar to recover enhanced rent from his tenant.

The plaintiff, Pandurang Sadashivrao, as Inamdar of the village of Manjipura in the Nadiad Taluka, was the grantee of the Royal share of revenue. At his request Government introduced survey settlement into the village, at which the plaintiff's name was entered as Khatedar or registered occupant of the lands in the village, inclusive of the land in dispute.

The defendant was the permanent tenant of the lands in dispute and was in possession long before the survey settlement was introduced. He used to pay Rs. 45-13-1 every year to the plaintiff as rent.

The plaintiff then enhanced the rent to Rs. 80; but the defendant declined to pay and contended that all he was liable to pay was the survey assessment under section 217 of the Bombay Land Revenue Code, 1879.

The plaintiff filed a suit to recover the enhanced assessment from the defendant. The Court of first instance held that the plaintiff was not entitled to enhance the rent and dismissed the suit.

for another person, or for a class of persons, or for the public; it includes a mortgagee vested with a right to possession.

217—When a survey settlement has been introduced, under the provisions of the last section or of any law for the time being in force, into an alienated village, the holders of all lands to which such settlement extends shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as occupants in unalienated villages have or are affected by, under the provisions of this Act, and all the provisions of this Act relating to occupants and registered occupants shall be applicable, so far as may be, to them

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On appeal, the lower Appellate Court held that the plaintiff was entitled to enhance the rent to a reasonable extent. It therefore, in recognition of plaintiff's right to enhance the rent, allowed an enhancement of 10 annas and 11 pies.

The defendant appealed to the High Court. The Inamdar-plaintiff having died was represented by the Collector of Kaira.

The appeal came up for hearing before a Bench composed of Russell and Aston, JJ., when their Lordships delivered the following interlocutory judgment on the 8th November 1905.

RUSSELL, J. :—This is a suit by an Inamdar claiming the right to enhance the rent of the defendant, who has been held to be a permanent tenant. A similar point was lately discussed by this High Court in the case of *Rajya v. Balkrishna Gangadhar*⁽¹⁾. The judgment in that case lays down what are the essential issues to be decided in a case of this nature. Inasmuch as findings on these issues have not been recorded by the learned Judge, it is impossible for this Court to pass any decree in this case.

We accordingly remand this case to the lower Appellate Court for findings on the following issues.—

(1) Was the Inam grant of the soil or of the Royal share of the revenue?

(2) Was the defendant, or any predecessor in title of his, in possession of the lands in suit at or before the date of the grant in Inam under which the plaintiff claims?

(3) If so, was he in possession at that time as tenant of the person to whom the Inam grant was made, and had he Mirasi rights?

(4) Is it rent or assessment that is payable?

(5) Has the plaintiff the right by virtue of usage or otherwise to enhance as against the defendant?

(6) If there is a right to enhance, then to what extent can the enhancement be made having regard (a) to the usage of the locality in respect of land of the same description and tenure and (b) what is fair and equitable?

(1) (1905) 29 Bom. 415.

In addition we would add a further issue, *viz*,

(7) Inasmuch as the learned Judge has found that the survey settlement has been introduced into this village, what effect, if any, will that have, having regard to section 217, Land Revenue Code, upon the plaintiff's alleged right to enhance the defendant's rent or assessment?

Fresh evidence to be adduced if necessary.

Findings to be returned in two months.

The findings recorded on the issues were as follows:—

- (1) That the *inam* was the grant of the Royal share of revenue.
- (2) In the negative.
- (3) Not necessary to decide.
- (4) It is the rent that is payable.
- (5) The plaintiff as owner has a right to enhance the rent as against the defendant.
- (6) That the rent can be enhanced to Rs. 46-8-0 only.
- (7) That the introduction of survey settlement in the village will have no effect on the right to enhance the defendant's rent.

The appeal came up for disposal before Chandavarkar and Heaton, JJ.

L. A. Shah for the appellant:—

The defendant, as permanent tenant, is a holder of the land in dispute (see section 3, clause 11 of the Bombay Land Revenue Code, 1879); and as such he is liable to pay only Government assessment under section 217 of the Code. The mere fact that the Inamdar is the registered occupant makes no difference. The defendant is the holder and as such he is entitled to the benefit of section 217. See also *Surshangji v. Naran*⁽¹⁾.

G. S. Rao, Government Pleader, for the respondent:—

The applicability of section 217 is governed by the expression "so far as may be" which it contains. The Inamdar is the registered occupant, and as such he is the "holder" within the

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meaning of the section. His tenant—permanent or otherwise—is not a holder. If it were not so, the result would be that a registered occupant cannot let out his land on any term he likes, which is not the case even in a Khalsa village.

L. A. Shah, in reply.

CHANDAVARKAR, J.:—The respondent is Inamdar of the village in which the land in dispute is situate and brought the suit out of which this appeal arises to recover enhanced rent. The appellant contested the claim on several grounds, one of which, material for the purposes of this appeal and decisive of the case, was that he was entitled to the benefit of section 217 of the Land Revenue Code and liable to pay only the Government rate of assessment levied on the land. The lower Appellate Court has disallowed that defence on the ground that the appellant is not a registered occupant of the land. But section 217 does not restrict its application to registered occupants only. It may be and indeed the lower Court finds that the appellant holds the land as a mere tenant under the Inamdar and that the latter has also acquired the right of occupancy. But section 217 invests "the holders of all lands" in alienated villages with the same rights and imposes upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages have. "Holder," as defined in clause 11 of section 3 of the Code, is wide enough to include even a tenant who has entered into possession under an occupant.

It was urged for the respondent that by the concluding part of section 217 the legislature intended it to apply "so far as may be." But those words are used of the latter part of the section only and do not, when grammatically read, operate to limit the plain language of the first part.

The decree must be reversed and the plaintiff must be given a declaration that he is entitled to recover from the defendant only the amount of assessment levied under the Land Revenue Code. As the defendant admits the amount claimed, the claim as to that is also awarded, but this award shall be without prejudice to the right declared by this decree. The respondent must pay the appellant's costs throughout.

HEATON, J.:—It is now established beyond controversy that the plaintiff is grantee only of the Royal share of the revenue, that the defendant is a permanent tenant under the plaintiff and that when the survey settlement was introduced into this village the Inamdar's name was entered as Khatedar or registered occupant of the lands in suit. At that time however, as for long before and since, the actual occupant was the defendant or his predecessor in title, who held as a permanent tenant. That being so, how does section 217 of the Bombay Land Revenue Code operate in this case? In virtue of being a permanent tenant, the actual occupant at the date of the settlement was one "in whom a right to hold land is vested" Therefore he was a "holder" within the meaning of that term as used in the Land Revenue Code. Consequently he "shall have the same rights and be affected by the same responsibilities in respect of the lands in his occupation as the occupants in unalienated villages." Therefore the defendant during the continuance of the settlement is only under an obligation to pay the survey assessment and no more.

The fact that at the time of the settlement the Inamdar's name was entered as Khatedar does not seem to me to affect the question. The right to cultivate the land vested in the tenant and that right carried with it a right to hold during the continuance of the settlement at no higher rent than the survey assessment, as soon as by the will of the Inamdar the settlement was introduced.

That is sufficient in my opinion for the decision in the case and therefore it is unnecessary to express any opinion on the other interesting point in the case: *viz.* whether after the earlier litigation evidenced by exhibits 61 and 62 it was open to the Courts to find on the evidence that the defendant or his predecessor in title was not in possession of the lands in suit, at or before the date of the grant in inam.

Therefore I agree with the order proposed by my learned colleague.

Decree reversed.

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ABKARI ACT (BOMBAY) (BOM. ACT V OF 1878), SECS. 43 (b), 47—*Cocaine—Illegal possession—Removal—Transportation of cocaine.*] Accused No. 1 who was illegally in possession of cocaine brought it from his room and gave it to accused No. 2 who stood opposite his house. The latter carried it to some distance and delivered to a Purdeshi. The two accused were, under these circumstances, charged with transporting cocaine, an offence punishable under section 43 (b) of the Bombay Abkari Act, 1878. The Magistrate, however, acquitted them of the offences and convicted them of illegal possession of cocaine, under section 47 of the Act. Against this order of acquittal, the Public Prosecutor appealed to the High Court:

Held, that the Magistrate was right in declining to convict the accused under section 43 (b) of the Bombay Abkari Act, 1878, inasmuch as the accused's offence consisted not in moving the cocaine from one place to another, but in the unauthorised possession of it at any place in contravention of the Act.

Section 43, clause (b), seems to contemplate rather the case of a person who is in lawful possession of cocaine at one place, but is by law forbidden to remove it either partly or wholly to another place.

EMPEROR v. BALVANTRAO ANANTRAO ... (1910) 34 Bom. 342

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ADEN ACT (II OF 1864), SECS. 8 AND 15—*Court-fees Act (VII of 1870), sec. 7, sub-sec. 4, cls. (c) and (d)—Suits Valuation Act (VII of 1887), sec. 8—Civil Procedure Code (Act XIV of 1882), sec. 551—Civil Procedure Code (Act V of 1908), sec. 115—Valuation for the purposes of Court-fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction.* The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards Rs. 50,000. The claim being for declaration and injunction was, under the provisions of the Court-fees Act (VII of 1870), section 7, sub-section 4, clauses (c) and (d) valued by the plaintiff at Rs. 130 upon which the prescribed Court-fee stamp was Rs. 10 only. The Assistant Resident rejected the plaint on the ground that it was not properly stamped.

Against the order of the Assistant Resident the plaintiff appealed to the Resident at Aden, and on the 23rd September 1908 presented an application under section 8 of the Aden Act (II of 1864) to state a case to the High Court

upon certain questions specified in the application. The Resident, however, on the next day, that is, on the 21th September summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). The judgment dismissing the appeal was read out to the plaintiff on the 7th October following, when she attended the Court.

The plaintiff, thereupon, preferred an application for revision to the High Court praying that the order dismissing the appeal might be quashed and that the Resident be required to state a case.

A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864),

Held, that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of section 8 of the Aden Act (II of 1864) the Resident's Court is subordinate to the High Court.

Under section 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its jurisdiction as a Court of Appeal from those Courts, the provisions of the Suits Valuation Act (VII of 1887) are 'the law for the time being for the valuation of claims' in the Courts of the Resident of Aden.

Held, further, that the plaintiff's claim being valued at Rs. 180 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court, it did not fulfil the requirements of section 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit.

RHIMBAI JAMALBHOY v. MARIAM BINTE ABDUL ... (1909) 34 Bom. 267

ADJUSTMENT—*Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115.*

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 258 ... 575

ADMINISTRATOR-GENERAL'S ACT (II OF 1874), SEC. 36—*Hindu Wills Act (XXI of 1870), secs. 2 and 5—Indian Succession Act (X of 1865), sec. 187—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.* A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by sec. 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870).

The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of sec. 187 of the Indian Succession Act (X of 1865).

NABAYAN SHRIDHAR v. PANDURANG BAPUJI ... (1910) 34 Bom. 508

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ADMINISTRATION SUIT—*Civil Procedure Code (Act V of 1908), sec. 33 Order XX, Rules 6 and 7—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Decree—Appeal.*

See CIVIL PROCEDURE CODE 182

Practice—Civil Procedure Code (Act V of 1908), Order I, Rule 8—Suit filed by plaintiff representing body of creditors—Application to be made party.] Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made party, he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent him.

In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties.

VASSONJI TRICUMJI & Co. v. ESMALBHAI SHIVJI ... (1909) 34 Bom. 420

ADOPTION—*Hindu Law—Mother's sister's son also father's brother's son.]* The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son.

The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither Sapindas nor Sagotias.

Ramchandra v Gopal (1908) 32 Bom. 619, followed.

WALBAI v. HEERBAI (1909) 34 Bom. 491

ADVERSE POSSESSION—*Saranjam—Inam—Claim to hold as Mirasi tenant—Limited interest.]* Where in an ejectment suit by an Inamdar it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants,

Held, that the defendants had acquired a title to the limited interest claimed by them and could not be ejected.

TRIMBAK RAMCHANDRA v. SHEKH GULAM ZILANI ... (1909) 34 Bom. 329

AGRICULTURIST—*Dekhan Agriculturists' Relief Act (XVII of 1879), sec. 2, cl. 2—Amending Act (XXIII of 1881)—Ratnágiri District—Mortgage of 1881—Suit for account.*

See DEKKHAN AGRICULTURISTS' RELIEF ACT 161

ALIENATION—*By widow—Consent by the body of reversioners—Transfer for legal necessity—Transaction for consideration—Gift—Partial relinquishment by widow—Hindu Law.]* The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity.

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Bajrangi Singh v. Manokarnika Baksh Singh (1907) 30 All. 1 and *Vinayak v. Govind* (1900) 25 Bom. 129, followed.

The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate.

PILU v. BABAJI (1909) 34 Bom. 165

AMENDMENT OF PLAINT—*Application for leave to amend plaint after arguments heard in appeal disallowed*] After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character.

BAYABAI v. HAJI NOOR MAHOMED... .. (1908) 34 Bom. 244

—————*Civil Procedure Code (Act XIV of 1882)—Amendment of plaint by referring to document not included in list of documents relied on*] At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgement in writing signed by the defendant within the period of limitation. The lower Court refused the application.

On appeal:—

Held, that the amendment should have been allowed.

GUNNAJI BHAWAJI v. MAKANJI KHOOSALCHAND ... (1909) 34 Bom. 250

—————*Civil Procedure Code (Act XIV of 1882), sec. 31—Civil Procedure Code (Act V of 1908), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiffs' claim allowed to the extent of their share—Limitation—Treatment of co-defendants as co-plaintiffs—Limitation Act (XV of 1877), secs. 22, 28.*

See LIMITATION ACT 91

ANVADHEYA—*Stridhan—Succession—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha—Hindu Law.*

See HINDU LAW 285

—————STRIDHAN—*Hindu Law—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.*

See HINDU LAW 553

APPEAL—*Suit for declaration and injunction—Rejection of plaint as not properly stamped—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction.*

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APPEAL— <i>Provincial Small Cause Courts Act (IX of 1887), secs. 16, 27, 32, Sch. II, cls. (2) and (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Jurisdiction by consent of parties.</i>	
<i>See</i> PROVINCIAL SMALL CAUSE COURTS ACT 	171
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ARBITRATION— <i>Reference by parties to a suit—Application to stay proceedings—Arbitration Act (IX of 1899), sec. 19.] Section 19 of the Arbitration Act only applies where there has been a submission to arbitration before the commencement of legal proceedings.</i>	
<i>Ramjidas Poddar v. House (1907) 35 Cal. 199, followed.</i>	
<i>PEBURI SURYANARAYAN & Co. v. GULLAPUDI CHINNA ... (1909) 34 Bom. 372</i>	
<i>Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing value of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding in as much as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), sec. 93—Sale—Tender—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Practice—Jurisdiction.</i>	
<i>See</i> JURISDICTION 	13
<i>Letters Patent, 1865, cl. 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss.] An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.</i>	
<i>Per CHANDAVARKAR, J.—When a submission to arbitration is being construed, a cardinal principle to be applied is that by a submission to arbitration a party deprives himself of the right at common law to have the dispute to</i>	

which the submission relates decided by a Court of law. It must therefore appear clearly from the terms of the submission that with reference to any point the party has so deprived himself.

The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred.

Montoya v. London Assurance Company (1851) 6 Ex. 451 at p. 458, referred to.

The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other Companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration, but when the order which the Court passes is only an intimation to the arbitrators of its opinion on the question of their jurisdiction it is immaterial whether all or some of the Companies are formally parties to the proceedings in appeal.

As to the objection that even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to a signatory.

Per BATCHELOR, J.—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the companies after the loss by fire or water had become an accomplished fact.

ATLAS ASSURANCE COMPANY, LIMITED, *v.* AHMEDBOY HABIBBOY
(1908) 34 Bom. 1

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Jurisdiction—Civil Procedure Code (Act V of 1908), sec. 24.] The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial.

The plaintiff having objected that the order of the Assistant Judge was without jurisdiction,

Held, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction.

Section 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge, he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a Court of unlimited pecuniary jurisdiction.

Haji Umar Abdul Rahiman v. Gustadi Muncherji ... (1910) 31 Bom. 411

BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), SEC. 48—
Government—Assessment on land—Land appropriated for agricultural purposes—Special user of land by stacking thereon timber in fair season—Construction of Statute.] The plaintiff, who was the occupant of land used for agricultural purposes, paid to Government the assessment chargeable on "land appropriated" for those purposes under clause (a) of section 48 of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff had let it out for stacking timber and derived profit from this special use of the land. Government levied an additional assessment on the land on account of that special user, purporting to do so under section 48, clause (b) of the Code.

Held, that the lands could not be charged with any additional assessment in respect of the special user under section 48, clause (b), of the Code; for the expression "appropriated for any purpose" in the clause means set apart for that purpose to the exclusion of all other uses.

The Bombay Land Revenue Code (Bombay Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject.

SECRETARY OF STATE v. LALDAS ... (1909) 34 Bom. 239

MUNICIPAL ACT (BOM. ACT III OF 1888 AS AMENDED BY BOM. ACT V OF 1905), SECS. 33 AND 34—Specific Relief Act (I of 1877), sec. 45—General principle underlying interference by High Court—Municipal election petition—Jurisdiction and discretion of Chief Judge of Small Causes Court.] A Municipal election petition having been lodged with the Chief Judge of the Small Causes Court, the latter unseated two of the successful candidates and found cause of objection against the candidate in whose favour were recorded "the next highest number of valid votes after those returned as elected." He declined to inquire further into the claims of any other candidate or to declare any other candidates elected, as, on his interpretation of section 33 (2) of the Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), he was not enabled to do so.

The two highest of the other unsuccessful candidates thereupon obtained rules against the Chief Judge under section 45 of the Specific Relief Act (I of 1877), to show cause why he should not proceed to declare them elected under section 33 (2) above mentioned.

Held, that the case fell within the general principle referred to in *Ex parte Milner* (1851) 15 Jur. 1037 that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would issue.

Section 33 having been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected, there was nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies. He should accordingly proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one qualified, or none qualified, proceedings for filling the vacancy or vacancies would have to be taken under section 34.

An application under section 33 (1) should name the persons whose election is objected to.

IN THE MATTER OF THE SPECIFIC RELIEF ACT (I OF 1877), AND IN THE MATTERS OF SARAFALLY MAMOOJI AND JAFFER JUSUB ... (1913) 34 Bom. 659

BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 251A, CL (a)—*Building*—“*Directly over or directly under*”—*Construction*.] The words “directly over or directly under” in section 251A, clause (a), of the City of Bombay Municipal Act (Bom. Act III of 1888) should be understood in the restricted sense of immediately over or immediately under, so that in effect under this section a water-closet may be built so as to be vertically over or under any part of a building provided that a bath-room intervenes.

Where it is not suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense.

CURRIMBOY EBRAHIM, SIR, v. THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY (1909) 34 Bom. 496

SEC. 305—*Municipal Commissioner*—*Notice, disobedience of*—*Private streets*—*Levelling and draining of*—*Liability of owners of several premises*—*Owners of building sites*—*Buildings constructed by lessees on the sites*—*Premises, what are*—*Construction of statutes*] The owner of a large plot of land sub-divided it into a number of building sites, which he arranged on either side of a private street which was projected to run through the plot. Those building sites were let to lessees (of whom the applicant was one) for a period of thirty years; at the end of the period the lessee was to remove the building put up by him unless the lessor purchased it. Under the terms of the lease the lessee was to contribute rateably to the expenses of making, repairing etc., all ways, roads, etc. The applicant was one of those lessees. He built a house upon one of those sites, and let it to tenants from whom he received rent. The Municipal Commissioner of Bombay issued a notice to the applicant, under section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888), calling upon him to level, metal, drain and light the public street in front of his building. The applicant failed to comply with the notice, for which he was prosecuted under section 471 of the City of Bombay Municipal Act, 1888.

He contended that he was not the owner of the premises within the meaning of section 305 of the Act. The Magistrate overruled the contention and convicted him.

Held, that the mere owner of the land who had let it out under a building scheme for building purposes was not the owner of the property, because the property contemplated by section 305 necessarily embraced buildings, whether erected or to be erected; and the legislature regarded him as the owner of the premises who had the right to receive rent in respect of that property.

The word "premises" occurring in section 305 of the City of Bombay Municipal Act (Bombay Act III of 1888) must be presumed to have been used by the legislature in its legal sense, as referring to the particular kind of property which forms the subject-matter of the group of immediately preceding sections of the Act. That group (sections 302—307) has reference to streets made for the use of buildings or building sites. The dominant idea running through the sections 302—304 is that of buildings either erected or projected. That is the kind of property dealt with in what has gone before section 305, and therefore that is its "*premissa*."

It is a primary rule of interpretation that a word having a popular meaning ought to be construed in that sense. One exception to that rule is that, unless there is something to the contrary in the context, words of known legal import are to be considered as having been used in their technical sense, where the law has attached that sense to them.

EMPEROR v. RAMCHANDRA BHASKAR MANTRI

... (1910) 34 Bom. 593

BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 377—*Municipal Commissioner—Neglected premises—Notice to remove nuisance—Magistrate's discretion.*] The accused was served with a notice of requisition under section 377 of the City of Bombay Municipal Act, 1888, requiring him to remove filth, rubbish, heaps of *cutchera* and stable refuse from a large piece of vacant land belonging to him. He failed to comply with the requisition, and a prosecution was instituted against him. The Magistrate viewed the premises; and having so viewed them, but without hearing any evidence acquitted the accused, as the premises did not appear to him to be in a filthy condition:—

Held, that the premises having appeared to the Commissioner in a filthy condition, the notice was validly issued under section 377 of the City of Bombay Municipal Act, 1888; and that there having been a non-compliance with the notice, the offence was complete.

Held, further, that the Magistrate was wrong in acquitting the accused on the sole ground that the premises did not appear to him to be in such a condition as to justify the issue of a notice under section 377.

Section 377 of the City of Bombay Municipal Act, 1888, enacts that the only condition precedent to the valid issue of a requisition is that it shall appear, not to the Magistrate, but to the Commissioner, that the premises are in the condition specified in the section.

EMPEROR v. RAJA BAHADUR SHIVLAL MOTILAL

... (1910) 34 Bom. 346

—SEC. 390—*Factory—Municipal Commissioner, permission of—Unauthorised factory.*] The accused obtained the Municipal Commissioner's permission (section 390 (1) of the City of Bombay Municipal Act, 1888), to establish a hand-loom factory worked by an oil engine; but by means of this oil engine he also established a flour mill without any permission. The accused was, therefore, charged with the offence under section 390 (1) of the Act,

Held, that the accused was guilty of a technical offence under section 390 (1) of the City of Bombay Municipal Act, 1888 : for although the accused had leave to establish the hand-loom factory, he had no leave to establish the flour mill factory, which was not the less another and a separate factory because it happened to be worked by the same power which it was proposed to employ in the permitted factory.

EMPEROR v. MULJI DAMODARDAS ...

... (1909) 34 Bom. 344

BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 394—*Indian Railways Act (IX of 1890), sec. 7—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary.* The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the Criminal Procedure Code (Act V of 1898):—

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Held, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorises the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and using the Railway notwithstanding anything in any other enactment for the time being in force.

The storing of timber was necessary for the convenient making, &c., of the Railway line.

Under section 7, sub-section 2 of the Indian Railways Act (IX of 1890) the Governor General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub-section 1.

MUNICIPAL COMMISSIONER OF BOMBAY v. G. I. P. RAILWAY COMPANY ...

(1908) 34 Bom. 252

REGULATION (V OF 1827), SEC. XV, CL. 3—*Usufructuary mortgage of 1869—Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property.* A usufructuary mortgage executed in the year 1869 contained the following agreement:—

"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day, redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

In the year 1906 the mortgagee having brought a suit for the recovery of the mortgage debt by sale of mortgaged property, the first Court allowed the claim, but the appellate Court reversed the decree and dismissed the suit on the ground that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagee has no higher or better right than he has under a simple usufructuary mortgage.

Held, on second appeal by the plaintiffs, that the mortgage in suit was governed by clause 3, section XV of Regulation V of 1827, and there being

nothing in the terms of the agreement between the parties which either expressly or by implication indicated that the property should not by means of a suit be applied in liquidation of the debt, the suit would lie.

The decree of the appellate Court reversed and that of the first Court restored.

Mahadaji v. Joti (1892) 17 Bom. 425 and *Ramchandra v. Tripurabai* (1898) P. J., p. 43, followed.

Shahk Idrus v. Abdul Rahiman (1891) 16 Bom. 303, *Sadashiv v. Vyankatrao* (1895) 20 Bom. 296 and *Krishna v. Hari* (1908) 10 Bom. L. R. 615, explained.

PABASHARAM v. PUTLAJIRAO ... (1909) 34 Bom. 128

BUILDINGS CONSTRUCTED BY LESSEES—*City of Bombay Municipal Act (Bombay Act III of 1888), sec. 305—Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of Statutes.*

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CANTONMENTS ACT (XIII OF 1889), SEC. 80—*Civil Procedure Code (Act V of 1908), secs. 2 (17), 80—Public officer—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889), sec. 80 applies to actions ex delicto and not to actions ex contractu.* A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a "public officer" within the meaning of section 2, clause (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, the notice prescribed by section 80 of the Code must be given.

The notice contemplated by section 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions *ex contractu*.

Rajmal v. Hanmant (1895) 20 Bom. 697, considered.

CECIL GREY v. THE CANTONMENT COMMITTEE OF POONA ... (1910) 34 Bom. 585

CANTONMENT COMMITTEE IS PUBLIC OFFICER—*Civil Procedure Code (Act V of 1908), secs. 2 (17), 80—Public officer—Suit against public officer—Notice of claim necessary—Cantonments Act (XIII of 1889), sec. 80 applies to action ex delicto and not to actions ex contractu.*

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<i>Sorabji Edalji v. Ishwardas Jagjivandas</i> (1892) P. J., p. 5, followed.	
<i>See</i> REGISTRATION ACT	202
<i>Tekait Ram Chander Singh v. Srimati Madho Kumari</i> (1885) L. R. 12 I. A. 197, referred to.	
<i>See</i> SARANJAM	329
<i>Valu v. Ganga</i> (1882) 7 Bom. 84, discussed.	
<i>See</i> HINDU LAW	278
<i>Vasudev Daji v. Babaji Ranu</i> (1871) 8 Bom. H. C. R. (A. C. J.) 175, referred to.	
<i>See</i> SARANJAM	329
<i>Vinayak v. Govind</i> (1900) 25 Bom. 129, followed.	
<i>See</i> HINDU LAW	165
<i>Vishnu Shambhog v. Manjamma</i> (1884) 9 Bom. 108, discussed.	
<i>See</i> HINDU LAW	278
<i>Westzintus, in re</i> (1883) 5 B. and Ad. 817, followed.	
<i>See</i> SALE OF GOODS ACT (56 AND 57 VIC., C. 71), SECS. 45 AND 47	640
<i>Yocl v. Ewing</i> (1903) Ir. Rep. 1 Ch. 434, distinguished.	
<i>See</i> SPECIFIC RELIEF ACT (I OF 1877), SEC. 42	676
<i>Zama Hasan v. Sundar</i> (1899) 22 All. 199, followed.	
<i>See</i> LIMITATION ACT (XV OF 1877), SEC. 8, SCH. II, ART. 179, EXPL. I... ..	672

CASH ALLOWANCE—*Tastak*—Arrears of cash allowance, suit to recover—*Limitation Act* (XV of 1877, Sch. II, Arts. 181, 62.] The plaintiff, the manager of the temple of Sri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants, the managers of the temple of Sri Madhukeshwar at Banawasi, a

sum of Rs. 96 as arrears of a cash allowance (tastik) which the former was entitled to receive from the property of the latter. The defendants admitted the title of the plaintiff to the allowance but pleaded limitation as to the arrears for two out of the six years. The lower Courts applied Article 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal,

Held, that the claim was properly allowed.

A cash allowance of the nature as in the present case is, according to Hindu law, *nibandha* or immoveable property; where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due. But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* immoveable property, in the nature of a periodically recurring right.

The important question is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment.

SAKHARAM HARI v. LAXMIPRIYA TIRTHA SWAMI

... (1909) 34 Bom. 349

CASTE-QUESTION—*Regulation II of 1827, sec. 21—Civil Court Jurisdiction—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.* The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and to obtain a perpetual injunction to restrain the defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the defendant had assumed a name to which the plaintiff had the exclusive right, and that that assumption would enable, as it had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriate to himself fees, which would otherwise have been paid to the plaintiff.

Held, that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office. It was a caste question not cognizable by a Civil Court.

Held, also, that the fact that there had been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that after all the result of the assumption of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the Court were to interfere in such cases, it would be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another.

GADIGEYA v. BASAYA ...

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... (1910) 34 Bom. 455

CASTE-QUESTIONS, JURISDICTION OF CIVIL COURTS IN—*Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Application of Indian Trusts Act (II of 1882), secs. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), sec. 151.* [As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan.

Held, that as trustee of the Derasar and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed.

Bank of Bombay v. Suleman (1908) 32 Bom. 466 at p. 474, referred to.

Held, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance.

Held, further, on the evidence, that there had been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed.

Held, further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste.

The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savachand* (1830) 5 Bom at p. 84 F. N. *Lalji Shamji v. Walji Wardhman* (1895) 19 Bom. 507, referred to and distinguished.

Held, lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908).

JETHABHAI NARSEY v. CHAPSEY COOVERJI ... (1909) 34 Bom. 46

CAUSE OF ACTION—*Letters Patent, clauses 12 and 14—Cause of action arising partly within jurisdiction—Further cause of action arising wholly outside jurisdiction—Joinder—Time of application.*

See LETTERS PATENT, CLAUSES 12 AND 14 56

—*Suit for price of goods bargained and sold—Indian Contract Act (IX of 1872), secs. 39, 73, 120—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), sec. 128.*

See CONTRACT ACT 19

—*Application to sue as pauper—Disqualification—Subject-matter of suit—Civil Procedure Code (Act V of 1908), Order XXXIII, Rules 1, 2 and 5.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXXIII, RULES 1, 2 AND 5 63

CAVEATOR—*Probate and Administration Act (V of 1881), sec. 81—Indian Succession Act (X of 1865), sec. 250—Will—Probate—Interest possessed by the caveator.*

See PROBATE AND ADMINISTRATION ACT ... 459

CERTIFICATE, ADMINISTRATOR-GENERAL'S—*Hindu Wills Act (XXI of 1870), secs. 2 and 5—Indian Succession Act (X of 1865), sec. 187—Administrator-General's Act (II of 1874), sec. 36—Will made in Bombay—Property worth less than Rs. 1,000—Probate.*

See HINDU WILLS ACT (XXI OF 1870), SECS. 2 AND 5 ... 506

—OF COLLECTOR—*Pensions Act (XXIII of 1871), secs. 6, 8, 11—Toda giras allowance—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance.*

See PENSIONS ACT ... 154

CHARGING ORDER—*Practice—Dissolution of partnership—Assets in hands of receiver—Judgment creditor—Solicitors' lien for costs.* The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court; and, where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership.

Ridd v. Thorne [1902] 2 Ch. 344, followed.

Where a plaintiff has obtained a decree against a partnership firm, the available assets of which are in the hands of a receiver appointed in a previous partnership suit, his proper course is not to issue execution against those assets, but to ask the Court for a charging order, and to undertake to deal with the charge according to the order of the Court.

Kewney v. Attrill (1886) 34 Ch. D. 345, followed.

A. HAJI ISMAIL AND CO. v. RABIABAI ... (1909) 34 Bsm. 484

CHIEF JUDGE OF SMALL CAUSES COURT, JURISDICTION AND DISCRETION OF—*Specific Relief Act (I of 1877), sec. 45—General principles underlying interference by High Court—Municipal election petition—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), secs. 33 and 34.*

See SPECIFIC RELIEF ACT (I OF 1877), SEC. 45 ... 659

CIVIL COURT, JURISDICTION OF—*Regulation II of 1827, sec. 21—Caste-question—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.*

See REGULATION II OF 1827 ... 455

—PROCEDURE CODE (ACT VIII OF 1859), SEC. 15—15 AND 16 VIC., c. 88, s. 50—*Specific Relief Act (I of 1877), sec. 42—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.* A Talukdar-plaintiff brought a suit for a declaration that defendant 2, a minor, was not his son and that he was not born to the plaintiff's wife, defendant 1, and for an injunction restraining defendant 1 from proclaiming to the world that defendant 2 was plaintiff's son and from claiming maintenance for him as such son. The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877), and that it was premature.

Held, that the suit was maintainable, it being within the provisions of section 42 of the Specific Relief Act (I of 1877).

Held, further, that in the interests of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay, and when the controversy had once been brought to trial the decision should ordinarily follow the usual course.

Yool v. Ewing (1903) Ir. Rep. 1 Ch. 434, distinguished.

BAI SHRI VAKTUBA v. THAKORE AGARSINGHJI RAISINGHJI... (1910) 34 Bom. 676

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*Amendment of plaint by referring to document not included in list of documents relied on*] At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application.

On appeal :—

Held, that the amendment should have been allowed.

GUNNAJI BHAWAJI v. MAKANJI KHOOSALCHAND ... (1909) 34 Bom. 250

SEC. 13.—*Res judicata*—*Capacity of parties—Matter substantially in issue—Civil Procedure Code (Act XIV of 1882), sec. 13.*] The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court but the Court of Appeal held that the property had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and be content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager.

Held, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*.

If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882) section 13 does not apply.

HARGOVAN RAMJI v. MULJI HARBIVAN ... (1909) 34 Bom. 416

SEC. 31—*Limitation Act (XV of 1887), secs. 22, 28—Civil Procedure Code (Act V of 1908), Order I, rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiffs' claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co plaintiffs—Amendment of plaint and decree.*

See LIMITATION ACT ... 91

SECS. 43 AND 50—*Transfer of Property Act (IV of 1882), sec. 90—Suit to recover mortgage-debt by sale of mortgaged and hypothecated property—Decree against mortgaged property alone—Sale—Amount realised not sufficient—Application for supplemental*

decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage] In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realised by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor.

The first Court found that the claim for a personal decree against the mortgagor was time-barred.

On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant but the appellate Court found that the plaintiff failed in his attempt and confirmed the decree.

On second appeal by the plaintiff *held*, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed.

Held, further, that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally.

GULAM HUSSEIN v. MAHAMADALI ISBAHIMI

... (1910) 34 Bom. 540

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 235, 327—*Gujarat Talukdār's Act (Bom. Act VI of 1888), secs. 28, 29B and 29E—Decree against Talukdār—Execution—Decree transferred to Talukdāri Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under sec. 29E of the Gujarat Talukdār's Act (Bom. Act VI of 1888)—Managing Officer—Talukdāri Settlement Officer.*] When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of section 235 of the Civil Procedure Code (Act XIV of 1882).

Hirachand Harjivandas v. Kasturchand Kasidas (1893) 18 Bom. 224, explained.

The effect of section 29E of the Gujarat Talukdār's Act (Bom. Act VI of 1888) is that before the execution of a decree can be proceeded with the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of section 29B of the Gujarat Talukdār's Act (Bom. Act VI of 1888) it may then proceed with the execution.

The expression 'managing officer' in section 29E of the Act is merely a compendious term for "the Talukdāri Settlement Officer or any other officer appointed by Government to take charge of the Talukdār's estate and keep the same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdāri Settlement Officer.

ment Officer, the 'managing officer' is merely a synonym for 'Tálukdári Settlement Officer.'

Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Tálukdári Settlement Officer, it amounts to a submission of the claim in writing within the meaning of section 29B of the Act, if the Tálukdári Settlement Officer is also the managing officer.

PURUSHOTTAM V. RAJBAL

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... (1909) 34 Bom. 142

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 244, 252, 647—

Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under sec. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger. C sued M on a money-bond. M having died during the pendency of the suit, his widow R and his brother N were brought by C on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be executed both R and N died. C then brought on the record the defendants as the legal representatives of M. The latter denied that they were M's legal representatives or that they had any property of M's which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale: and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of M and defendants' survived to the latter at M's death; and that the plaintiff obtained no title at the Court-sale which he could legally assert against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of section 244 of the Code of Civil Procedure, 1882, from asserting their title.

Held, that as the property was sold by the Court at C's instance as that of M, the question so far was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under section 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within section 244 of the Code by reason of the explanation to section 647 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned.

It was contended that whatever might have been the result if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that section 244 did not apply:—

Held, that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit.

The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

GORULING BHIKARAM V. KISANSINGH

...

... (1910) 34 Bom. 546

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 258—*Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115.* A decree was adjusted outside the Court. No notice was given to the Court of the adjustment; and its sanction was not taken under section 258 of the Civil Procedure Code of 1882. The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that the adjustment not having been certified to the Court, it could not recognise it as valid but was bound to execute the decree. The Subordinate Judge overruled the contention holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act, 1872.

Held, that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of section 258 of the Civil Procedure Code, 1882.

There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 258 enacts a special law for a special purpose, whereas section 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law.

Per CHANDAVARKAR, J.—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law.

Per HEATON, J.—The purpose of section 258 of the Civil Procedure Code, 1882, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree.

TRIMBAK RAMKRISHNA v. HARI LAXMAN ... (1910) 34 Bom. 575

SEC. 375—*Dekkhani Agriculturists' Relief Act (XVII of 1879), sec. 12—Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise.* There is nothing in the provisions of section 12 or in any other section of the Dekkhan Agriculturists' Relief Act, 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under section 375 of the Civil Procedure Code of 1882 which is the same as Order XXIII, rule 3 of the Code of 1908.

A compromise means the settlement of a disputed claim.

Where a party complains that a compromise effected in his name by his pleader was unauthorized, he must move the Court to cancel all that has been done and to revive the suit.

Basangowda v. Churchigirigowda (1910) see p. 408 ante, followed.

PIRAJI v. GANAPATI ... (1910) 34 Bom. 502

SEC. 551—*Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction.*

See JURISDICTION ... 67

CIVIL PROCEDURE CODE (ACT V OF 1908), SECS. 2 (17), 80—*Public officer—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889), sec. 80 applies to actions ex delicto and not to actions ex contractu.*] A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a “public officer” within the meaning of section 2, clause (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, the notice prescribed by section 80 of the Code must be given.

The notice contemplated by section 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions *ex contractu*.

Rajmal v. Hanmant (1895) 20 Bom. 697, considered.

CECIL GREY v. THE CANTONMENT COMMITTEE OF POONA ... (1910) 34 Bom. 583

SEC. 11—*Limitation Act (XV of 1877), secs. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata.*] A suit filed in *forma pauperis* was decided on the 10th February 1908. An application for leave to appeal in *forma pauperis* was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *forma pauperis* must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it.

Held, overruling the contention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period.

The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

CHINTAMAN VIANKATRAO v. RAMCHANDAR VIANKATRAO ... (1910) 34 Bom. 589

SEC. 24—*Bombay Civil Courts Act (XIV of 1869), Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction.*] The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial.

The plaintiff having objected that the order of the Assistant Judge was without jurisdiction.

Held, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction.

Section 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge, he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a Court of unlimited pecuniary jurisdiction.

Haji Umar Abdul Rahiman v. Gustadji Muncherji ... (1910) 34 Bom. 411

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 33, ORDER XX, RULES 6 AND 7—*Administration suit—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Decree—Appeal.*] In an administration suit the first Court recorded a finding on a substantial question of right between the parties and appointed receivers. The plaintiff did not apply to have a formal decree drawn up. The plaintiff however appealed against the finding on the ground that it amounted to a decree. The Judge rejected the appeal holding that there was no decree which could be the subject of an appeal.

On second appeal by the plaintiff,

Held, that the second appeal could not be entertained because there was in fact no formal decree from which an appeal could be preferred.

Bai Diwali v. Shah Vishnav Manordas ... (1910) 34 Bom. 182

SEC. 115—*Application for revision.*

See JURISDICTION ... 267

SEC. 128—*Course of action—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Indian Contract Act (IX of 1872), secs. 39, 73, 120.*

See CONTRACT ACT ... 192

SEC. 151—*Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable.*] The plaintiff brought a suit in the Court of the First Class Subordinate Judge and finally obtained a decree declaring that an attachment on certain money, already lying in deposit in that Court, levied by the defendant in execution of his Small Cause Court decree was invalid and decreeing that the defendant should repay the same to the plaintiff. In execution of the said decree in the suit of the Court of the First Class Subordinate Judge the plaintiff applied to the Small Cause Court for the refund of the money and that Court passed an order for the refund. The defendant, thereupon, preferred an application to the High Court under the extraordinary jurisdiction.

Held, setting aside the order, that such an order could only be made if it was necessary for two purposes, namely, for the ends of justice or to prevent the

abuse of the process of the Court. The plaintiff had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court.

GANESH NARAYAN v. PURUSHOTTAM GANGADHAR ... (1909) 34 Bom. 135

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 151—*Caste—Trustees of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste questions—Application of Indian Trusts Act (II of 1882), secs. 5 and 6, to creation of trusts to caste funds.*] Held, lastly when according to well-established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908).

See TRUSTS ACT (II OF 1882), SECS. 5 AND 6 ... 467

ORDER I, RULE 3, ORDER II, RULE 3—*Grades of several defendants in one suit—"Same act or transaction"—"Series of acts or transactions"—Practice.*] In reading Order I, Rule 3, of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word "same" which precedes the words "acts or transaction" governs also the words "series of acts or transactions" and must be read before those words also. The first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the same act or transaction or from the same series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit both the conditions laid down in the rule must be fulfilled, first, the relief sought against the defendants whether jointly, severally or in the alternative must arise from the same act or transaction or the same series of acts or transactions. And, secondly, there must arise between the plaintiff and all the defendants some common question of law or fact.

The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are "jointly liable in respect of each and all of such causes of action" and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all "have a joint interest in the main question raised by the litigation" and that causes of action joined in one suit against several defendants must be causes of action in which "the defendants are all jointly interested."

It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary.

UMABAI v. BHAI BALWANT ... (1908) 34 Bom. 358

ORDER I, RULE 8—*Practice—Suit filed by plaintiff representing body of creditors—Application to be made party—Administration suit.*] Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party, he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent him.

In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the

delay caused by the addition of a party and the consequent increase in the costs of other parties.

VASSONJI TRICUMJI & Co. v. ESMAILBHAI SHIVJI ... (1909) 34 Bom. 420

CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER I, RULE 9—*Limitation Act (XV of 1877), secs. 22, 28—Civil Procedure Code Act (XIV of 1882), sec. 31—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiff's claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decree.*

See LIMITATION ACT 91

ORDER XXXIII, RULES 1, 2 AND 5—*Application to sue as pauper—Disqualification—Subject-matter of suit—Cause of action.* A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property by the mortgagee, with an alternative claim for damages. The mortgagee, admitting there was a surplus due to the applicant after the mortgage-debt had been satisfied, paid Rs. 101 into Court, and contended that the applicant was not a pauper, and further that the applicant disclosed no cause of action.

Held, that the applicant was a "pauper" within the meaning of the Explanation to Order XXXIII, Rule 1, of the Civil Procedure Code (Act V of 1908), but that the allegations contained in the application did not disclose a cause of action.

Dwarkanath v. Madhavray (1886) 10 Bom. 207, not followed.

FATMABAI v. DOSSABHOY RUSTOMJI UMBIGAR ... (1909) 34 Bom. 688

COCAINE—*Illegal possession—Removal—Transportation of cocaine—Bombay Abkari Act (Bom. Act V of 1878), secs. 43 (b), 47.*

See ABKARI ACT 342

COMPANY—*Insurance against fire—Liability of Company for further loss.*

See INSURANCE, FIRE 1

COMPENSATION—*Land Acquisition Act (I of 1894)—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice.*

See LAND ACQUISITION ACT (I OF 1894) 486

COMPROMISE—*Transfer of Property Act (IV of 1882), sec. 54—Sale—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary.*

See TRANSFER OF PROPERTY ACT 139

Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside—Court—Inherent powers—Practice.

See PRACTICE 408

MEANING OF—*Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 12—Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his*

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<i>client—Client to apply to cancel the compromise</i>] A compromise means the settlement of a disputed claim	
See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII of 1879), sec 12 ..	502
CONSTRUCTION OF AN AWARD— <i>Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Court-sale—Prohibition not effective</i>	
See PRE-EMPTION	567
CONTRACT— <i>Indian Contract Act (IX of 1872), sec 215, 216—Agent appointed to sell goods buying them on his own account—Principal and Agent</i>	
See PRINCIPAL AND AGENT	292
STATUTE— <i>Bombay Land Revenue Code (Bom Act V of 1879), sec 48</i>] The Bombay Land Revenue Code (Bom Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject	
SECRETARY OF STATE v LALDAS	(1909) 34 Bom 239
STATUTES— <i>City of Bombay Municipal Act (Bom. Act III of 1888), sec 251A, cl (a)—Building—"Directly over or directly under"—Construction</i>] Where it is not suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense.	
See BOMBAY MUNICIPAL ACT (BOM ACT III OF 1888), sec 251A, cl (a) ...	496
CONTRACT ACT (IX OF 1872), SECS. 39, 73, 120— <i>Suit for price of goods bargained and sold—Cause of action—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), sec. 128</i>] Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an <i>debitatus</i> count, thus the count lay where the consideration moving from the seller of goods, was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was and to sound in debt and not in damages.	
In section 128 of the Civil Procedure Code of 1908 there is legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India.	
The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands. The fact that a party to a contract may under section 39 of the Indian Contract Act, when the other side has refused to perform it, put an end to it and sue for compensation for the breach does not oblige him to take that course at his peril, he may if he prefers it sue to recover any debt due to him which has arisen from his execution of his part of the contract.	
Per BATCHELOR, J.—Section 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy.	
P. R. & Co. v. BHOWANIES	(1909) 34 Bom. 192

CONTRACT ACT (IX OF 1872), SEC. 57—*Cont. act—Wagering—Intention of the parties—Payment of differences.*] There is no authority for the proposition that, because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying section 57 of the Contract Act.

JOSHI NARBADASHANKAR v. MAHURADAS . . .

(1910) 34 Bom. 519

STC. 93—*Sale—Tender—Contract of sale made subject to rules of Rice Merchants Association—Rule giving jurisdiction of Court of law—Rule providing for fixing value rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration.*

See JURISDICTION . . .

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SECS. 215, 216—*Principal and Agent—Construction of Contract—Agent appointed to sell goods buying them on his own account.*] Section 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of an account of the latter. The principal is free to exercise that right or not.

The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate. But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

Where an agent, appointed to sell his principal's goods for a fixed price, buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.

Salomons v. Pender (1865) 3 H. & C. 639 and *Andrews v. Ramsay & Co.* [1908] 2 K. B. 635, referred to.

JOACHINSON v. MEHJEE VALLABHDAS . . .

(1909) 34 Bom. 292

CONTRIBUTORY NEGLIGENCE—*Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contractual obligations.*] The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.

Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.

In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage.

The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened.

DULLABHJI SAKHIDAS v. THE G. I. P. RAILWAY CO. ... (1909) 34 Bom. 427

COSTS—*Guardian ad litem of a lunatic—Personal liability of guardian to pay costs incurred by unnecessary appeal.* The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when a guardian *ad litem* takes it upon himself to appeal against a decree, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem*.

SHAFURJI HORMASJI v. MONOSSEH JACOB ... (1909) 34 Bom. 374

— *Practice—Dissolution of partnership—Assets in the hands of receiver—Judgment-creditor—Charging order—Solicitor's lien for costs.*

See SOLICITOR'S LIEN FOR COSTS ... 484

COURT—*Inherent powers—Compromise—Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside—Practice.*

See PRACTICE ... 408

COURT-FEES ACT (VII OF 1870), SEC. 7, SUB-SEC. 4, CLS (c) AND (d)—*Suit for declaration and injunction—Valuation for the purposes of Court-fees and jurisdiction—Rejection of plaint as not properly stamped.*

See JURISDICTION ... 267

COURT-SALE—*Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Prohibition not effective.*

See PRE-EMPTION ... 567

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 162, 288—*Indian Evidence Act (I of 1872), secs. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and Procedure.* During the trial of an accused person the Sessions Judge admitted into evidence and used against the accused the following statements: (1) statements made by a witness to the Police implicating the accused, (2) the same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal:—

Held, (1) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial: not to corroborate statements made prior to the trial.

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(2) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admission by the co-accused which could possibly be used against himself, but could not be proved and used against the accused.

The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issue. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure, which is that such statements should be used, if at all, on behalf of and not against the person under trial.

EMPEROR v. AKBAR BADOO ... (1910) 34 Bom. 599

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 109, 123, 397—*Penal Code (Act XLV of 1860), sec. 329—Concurrent sentences—Consecutive sentences*] The accused was proceeded against under section 109 of the Criminal Procedure Code, and sentenced on the 6th July 1909, under section 123 of the Code, to rigorous imprisonment for nine months, in default of security for good behaviour. He was then tried for an offence of theft committed by him in November 1908, and was, on the 17th August 1909, sentenced to suffer rigorous imprisonment for three months: the second sentence was directed to take effect on the expiry of the first sentence.

Held, that the two sentences ought not to run consecutively; but must run concurrently.

EMPEROR v. ARJUN ... (1909) 34 Bom. 326

SEC. 195—*Sanction to prosecute—Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882), secs. 37, 38.*] Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, the Full Court of that Court has no power to revoke the sanction.

Per CHANDAPARKAR, J.—The language used in sections 37 and 38 of the Presidency Court of Small Causes Act (XV of 1882) does not appear to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court.

Per BATCHELOR, J.—The jurisdiction conferred by section 38 of the Act is not appellate, but revisional only.

SHIVLAL PADMA, *In re* ... (1909) 34 Bom. 316

SECS. 195, 478—*Sanction to prosecute—Subsequent order to prosecute passed under sec. 478.*] The grant of a sanction to prosecute to a private individual under section 195 of the Criminal Procedure Code, 1898, is no bar to the subsequent institution of proceedings by the Civil Court itself under section 478 of the Code.

Queen-Empress v. Shankar (1888) 13 Bom. 384, followed.

EMPEROR v. NAGJI GHELABHAI ... (1909) 34 Bom. 88

SEC. 435—*High Court—Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned.*

See HIGH COURT ... 378

CURATOR'S ACT (XIX OF 1841), SECS. 3, 4 AND 14—*Oath's Act (V of 1840)—*

Death of representative Vatandar—Deceased's widow representative Vatandar—Death of the widow—Application by the nearest heir of the deceased male

Vatandar for possession—Six months, calculation of—Property claimed by right “in succession”—Inquiry upon solemn declaration—Affidavit upon solemn affirmation.] One Kotiappa, representative Vatandar of Deshagat Vatan, died in 1892. His widow Basawa was entered on the Vatan Register as representative Vatandar and she held the Vatan property until her death in 1907. Within six months of Basawa's death, Khanappa, who claimed to be the nearest heir of Kotiappa, applied for possession of the property under the Curator's Act (XIX of 1841) and the Judge granted his application. One of the opponents to the application thereupon moved the High Court under the extraordinary jurisdiction contending that,

(1) Under section 14 of the Curator's Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the date of the application, and

(2) In granting the application the Judge did not follow the procedure which is made imperative by the words of section 3 of the Curator's Act (XIX of 1841), that is, there was no inquiry upon solemn declaration of the complainant (applicant).

Held, confirming the order, that,

(1) The decease of the proprietor whose property was claimed by right “in succession” referred to in section 11 of the Curator's Act (XIX of 1841) included the decease of Basawa because she was, between the death of her husband and her own decease, the proprietor of the property claimed. All that was to be decided was who should be put into possession of the property in succession to the last deceased holder.

(2) The Judge having acted upon the application of the claimant in addition to his affidavit on solemn affirmation, the statements in the affidavit furnished sufficient grounds for action under section 4 of the Curator's Act (XIX of 1841) having regard to the provisions of the Oath's Act (V of 1840)

BHIMAPPA v. KHANAPPA . . . (1909) 31 Bom. 115

DAMAGES, MEASURE OF—*Stoppage in transitu—Ultimate destination of goods—Duration of transit—Pledgee of bill of lading—Sale of Goods Act (56 and 57 Vic., c. 71), secs. 45 and 47.*

See SALE OF GOODS ACT (56 AND 57 VIC., c. 71), SECS. 45 AND 47 ... 640

DAUGHTERS, INHERITANCE OF—*Hindu Law—Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants-in-common.*] In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely.

When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship between them.

In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject.

VITHAPPA v. SAVITRI . . . (1910) 34 Bom. 510

DEATH OF JUDGMENT-DEBTOR—*Civil Procedure Code (Act XIV of 1882), secs. 244, 252, 647—Decree—Execution—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under sec. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.*

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 244, 252, 647 ... 546

DEBTS—*Hindu law—Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor co-parcener—Liability of minor co-parcener in suit on promissory notes.*

See HINDU LAW 72

DECLARATION OF RIGHT, SUIT FOR—*Public road—Right of marching in procession with a car—Injunction restraining interference with the right.]* Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved.

On second appeal by the plaintiffs *held*, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege.

Sadgopachariar v. A Rama Rao (1902) 23 Mad. 376, followed.

BASLINGAPPA PARAPPA v. DHARMAPPA BASAPPA ... (1910) 31 Bom. 571

—, SUIT FOR—*Lund held as Saranjani—Decision of the Income Commissioner—Finality—Exclusion of Jurisdiction of Civil Courts—Revenue Jurisdiction Act (X of 1876), sec. 4, sub-sec. (a).*

See REVENUE JURISDICTION ACT 232

— *Specific Relief Act (I of 1877), s. 42—Civil Procedure Code (Act VIII of 1859), sec. 15—15 and 16 Vic, c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.*

See CIVIL PROCEDURE CODE (ACT VIII OF 1859) SEC. 15—15 AND 16 VIC, c. 86, s. 50 676

— *Hereditary Offices Act (Bom. Act III of 1874), secs. 25, 36—Death of registered Patandan—Representation—Eldest son or other nearest heir of the deceased—Jurisdiction.*

See HEREDITARY OFFICES ACT 101

— AND INJUNCTION, SUIT FOR—*Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction—Aden Act (II of 1864), secs. 8 and 15.*

See JURISDICTION 267

DECREE—*Civil Procedure Code (Act XIV of 1862), secs. 235, 320—Gujarat Talukdar's Act (Bom. Act VI of 1888), secs. 28, 29B and 29E—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under section 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888)—Managing Officer—Talukdari Settlement Officer.*

See CIVIL PROCEDURE CODE 142

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DECREE.— <i>Civil Procedure Code (Act V of 1908), sec. 33, Order XX, Rules 6 and 7</i> — <i>Administration suit—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Appeal.</i>	
See CIVIL PROCEDURE CODE	182
— <i>Civil Procedure Code (Act V of 1908), sec. 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the small Cause Court and order for refund by that Court—Order not sustainable.</i>	
See CIVIL PROCEDURE CODE	135
— <i>Execution of decree—Decree for rent—Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent.] In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal:—</i>	
<i>Held</i> , that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decrees were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set-off.	
MUGAPPA v. MAHAMADSAHEB	(1909) 34 Bom. 260
— <i>Execution—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed—Limitation Act (XV of 1877), Art. 179, cl. 4.</i>	
See LIMITATION ACT	68
— <i>Execution—Execution made conditional upon payment of Court fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law—Limitation Act XV of 1877), Art. 179.</i>	
See LIMITATION ACT	189
— <i>Pensions Act (XXIII of 1871), secs. 6, 8, 11—Toda giras allowance—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance—Certificate of Collector.</i>	
See PENSIONS ACT	154
— <i>Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in appeal—Decree in the suit—Interpretation—Dekkhan Agriculturists' Relief Act (XVII of 1879), sec. 15D,</i>	

cl. (3)] Held, dismissing the second appeal, that when the decree of the lower Court is reversed or varied in appeal, the decree of the appellate Court becomes the decree in the suit which is to be executed in execution proceedings.

NAVLAJI SARDARMAL *v.* RAMA DHONDI ... (1909) 34 Bom. 158

DECREE—*Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members—Transfer of Property Act (IV of 1882), sec. 85.*

See TRANSFER OF PROPERTY ACT ... 354

—, EXECUTION OF—*Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115.*

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 258 ... 575

—, *Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective.*

See PRE-EMPTION ... 567

DECREE-HOLDER—*Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), sec. 115.*

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 258 ... 575

—, MAJOR, RIGHT OF, TO GIVE DISCHARGE—*Limitation Act (XV of 1877), sec. 8, sch. II, art. 179, expl. I—Limitation Act (IX of 1908), sec. 7—Minor decree-holders—Application for execution by guardian—Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge in respect of the judgment-debt.*

See LIMITATION ACT (XV OF 1877), SEC. 8, SCH. II, ART. 179, EXPL. I... 672

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—*Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent—Execution—Decree.*

See DECREE ... 260

SEC. 2—*Agriculturists—Definition—Interpretation.*] Section 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) gives two definitions of the term "agriculturist," one in clause 1 and the other in clause 2.

The former applies where a party to a suit is an agriculturist at the time the suit is filed by or against him.

The second clause, which gives a special definition of the term "agriculturist" for the purposes of Chapters II, III, IV, and VI and section 69 of the Act, is not exhaustive but is merely inclusive and is intended for a special purpose.

The decision in *Mahadev Narayan Lokhande v. Vinayak Gangadhar Purandhare* (1909) 33 Bom. 504 does not lay down the proposition of law that a party to a suit is not entitled to the privileges of an agriculturist under the

Dekkhan Agriculturists' Relief Act, 1879, if he was not an agriculturist at the time the liability in question was incurred even though it may be that he was an agriculturist within the meaning of the first clause of section 2 at the time of the suit.

DAMODAR NANDRAM v. MANUBAI ... (1909) 34 Bom. 65

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 2, CL. 2—*Amending Act (XXIII of 1881)—Ratnagiri District—Mortgage of 1881—Suit for account—Agriculturist.*] The plaintiff whose land and residence was in Ratnagiri District executed a mortgage in the year 1881. The Dekkhan Agriculturists' Relief Act (XVII of 1879) which extended to the districts of Poona, Satara, Sholapur and Ahmednagar, was not applicable to the Ratnagiri District in the year 1881. In the year 1896 the plaintiff brought a suit for an account of what was due on the mortgage under the provisions of section 15D of the Act (XVII of 1879) and contended that he was an agriculturist in 1881, that is, when the liability under the mortgage was incurred.

Held, that the plaintiff could not sue under section 15D of the Act (XVII of 1879) as he was not an agriculturist within the meaning of the Amending Act (XXIII of 1881).

The expression "then defined by law" in section 2, clause 2 of the Act (XVII of 1879) relates to the time when any part of the liability was incurred.

SHANKAR RAMKRISHNA v. KRISHNAJI GANESH ... (1909) 34 Bom. 161

SEC. 12—*Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleaders compromising without authority from his client—Client to apply to cancel the compromise.*] There is nothing in the provisions of section 12 or in any other section of the Dekkhan Agriculturists' Relief Act, 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under section 375 of the Civil Procedure Code of 1882 which is the same as Order XXIII, rule 3 of the Code of 1908.

A compromise means the settlement of a disputed claim.

Where a party complains that a compromise effected in his name by his pleader was unauthorised, he must move the Court to cancel all that has been done and to revive the suit.

Basangowda v. Churchigirigowda (1910) see page 403 ante, followed.

PIRAJI v. GANAPATI ... (1910) 34 Bom. 502

SECS. 12 AND 13—*Retrospective effect—Indebtedness existing at the date of the passing of the Act, as well as future indebtedness.*] The plaintiff sued to recover from the defendant a certain sum due on a money bond, dated the 17th May 1904. The suit was cognizable by the Court in its Small Cause jurisdiction. The bond sued on was passed in adjustment of an existing debt which itself was the balance due on previous advances. Some of the provisions including sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were made applicable to the district on the 15th August 1905 and the present suit was filed on the 26th March 1909. As the several advances which led to the bond were prior in date to the application of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the district, the following question arose:—

"Whether section 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is retrospective so as to apply to the case of transactions entered into before the date of its extension to the district but the suit in respect of which is instituted after that date?"

Held in the affirmative that section 13 of the Act is retrospective.

Sections 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) show that it was the intention of the legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness.

SIVLAL JETHADHAI v. BHIKHA RAMJAN ... (1909) 34 Bom 220

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 15D, CL. (3)—*Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decrees passed by Court in appeal—Decree in the suit—Interpretation.* In a suit for an account brought by a mortgagor under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the Court found that a sum of Rs 100 was due by the plaintiff to the defendant. The defendant appealed. The appellate Court, on the plaintiff's application that his suit should be treated as one for redemption, passed a decree for redemption on payment of Rs. 49-2-0 by the plaintiff to the defendant.

The defendant preferred a second appeal contending that the words "the decree in the suit" in section 15D, clause (3) of the Act meant decrees in the original Court and not of the Court of Appeal.

Held, dismissing the second appeal, that when the decree of the lower Court is reversed or varied in appeal, the decree of the appellate Court becomes the decree in the suit which is to be executed in execution proceedings.

NAVLAJI SARDARMAL v. RAMA DHONDI ... (1909) 34 Bom. 158

DELAY—*Limitation Act (XV of 1877), secs. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), sec. 11.*

See LIMITATION ACT (XV OF 1877), SECS. 5 AND 7 ... 589

—IN INVESTIGATION OF CLAIM—*Specific Relief Act (I of 1877), sec. 42—Civil Procedure Code (Act VIII of 1859), sec 15—15 and 16 Vic., c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son.*

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), SEC. 15—15 AND 16 VIC., c. 86, s. 50 ... 676

DEPOSITION, CORROBORATION OF—*Criminal Procedure Code (Act V of 1898), secs. 162, 288—Indian Evidence Act (I of 1872), secs. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before the Committing Magistrate—Witness deposing to different story before the Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.*

See EVIDENCE ACT (I OF 1872), SECS. 21, 157 ... 599

DIRECTIONS—*Practice—Third party procedure—Directions, refusal to give—Discretion.*

See THIRD PARTY ... 423

DOCUMENT—*Granting exemption of assessment in lieu of services rendered or to be rendered not stamped or registered.*

See TRANSFER OF PROPERTY ACT ... 287

DOCUMENTS, INSPECTION OF—*Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste-questions—Application of Indian Trusts Act (II of 1882), secs. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), sec. 151.* As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan.

Held, that as trustee of the Derasar and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed.

Bank of Bombay v. Suleman (1908) 32 Bom. 466 at p. 474, referred to.

Held, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance.

Held, further, on the evidence, that there has been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed.

Held, further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste.

The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with decision in *Nemchand v. Savaichand* (1880) 5 Bom. at p. 84 F. N. *Lalji Shamji v. Walji Wardhman* (1895) 19 Bom. 507, referred to and distinguished.

Held, lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908).

JETHABHAI NARSEY v. CHAPSEY COOVERJI ... (1909) 34 Bom. 167

DOMICILE—*Application for guardianship of minor—Place where the minor ordinarily resides—Jurisdiction—Guardians and Wards Act (VIII of 1890), sec. 9.*

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EJECTMENT, SUIT FOR—*Saranjam—Inam—Miras (permanent tenancy)—Denial of Saranjamdar's title—Attornment to successive Saranjamdars—Estoppel—Claim to hold as mirasi tenant—Limited interest—Adverse possession.*

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See BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888 AS AMENDED BY BOM. ACT V OF 1905), SECS. 33 AND 34 ... 659

ESTOPPEL—*Saranjam—Inám—Miras (permanent tenancy)—Denial of Saranjamdar's title—Attornment to successive Saranjamdars*] In an ejectment suit brought by an Inámдар against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inám rights in the land in suit appertained to a Saranjam held on political tenure and that the present incumbent of the Saranjam was the plaintiff. The defendants resisted the plaintiff's claim to eject them on the ground that the Inám rights were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inám, had descended to his heirs independently of the Inám and furnished the leasehold or Mirasi right.

Held, that the defendants' contention involved the denial of the title to the reversionary rights in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title.

Vasudev Daji v. Babaji Ranu (1871) 8 Bom. H. C. R. (A. C. J.) 175 and *Doddem. Marlow v. Wiggins* (1843) 4 Q. B. 367, referred to.

TRIMBAK RAMCHANDRA v. SHEKH GULAM ZILANI ... (1909) 34 Bom. 329

———— **BY CONDUCT**—*Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Indian Evidence Act (I of 1872), sec. 115.*

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 258 ... 575

EVIDENCE ACT (I OF 1872), SECS. 21, 157—Criminal Procedure Code (Act V of 1898), secs. 162, 238—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.] During the trial of an accused person, the Sessions Judge admitted into evidence and used against the accused the following statements: (1) statements made by a witness to the Police implicating the accused, (2) the same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal:—

Held, (1) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by section 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial.

(2) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself, but could not be proved and used against the accused.

The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide

field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover it is contrary to the plain intention of section 162 of the Code of Criminal Procedure which is that such statements should be used, if at all, on behalf of and not against the person under trial.

EMPEROR v. AKBAR BADOO ... (1910) 34 Bom 599

EVIDENCE ACT (I OF 1872), sec. 92—*Written agreement—Sale-deed—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, &c.—Oral agreement cannot be pleaded.* Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void.

SANGIRA MALAPPA v. RAMAPPA ... (1909) 34 Bom, 59

SEC. 115—*Civil Procedure Code (Act XIV of 1882), sec. 258—Adjustment or payment of decree—Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct.* A decree was adjusted outside the Court. No notice was given to the Court of the adjustment; and its sanction was not taken under section 258 of the Civil Procedure Code of 1882. The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that the adjustment not having been certified to the Court, it could not recognise it as valid, but was bound to execute the decree. The Subordinate Judge overruled the contention, holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under section 115 of the Indian Evidence Act, 1872.

Held, that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of section 258 of the Civil Procedure Code, 1882.

There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of section 258 enacts a special law for a special purpose, whereas section 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law.

Per CHANDAVARKAR, J.—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law.

Per HEATON, J.—The purpose of section 258 of the Civil Procedure Code, 1882, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree.

TRIMBAK RAMKRISHNA v. HARI LAXMAN ... (1910) 34 Bom. 575

EVIDENCE, ADMISSIBILITY OF—*Criminal Procedure Code (Act V of 1898), secs. 162, 288—Indian Evidence Act (I of 1872), secs. 22, 157—Evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before the Committing Magistrate—Witness deposing to different story before the Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.*

See EVIDENCE ACT (I OF 1872), SECS. 21, 157.

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EXECUTION— <i>Civil Procedure Code (Act V of 1908), sec. 151—Decree of Small Cause Court—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable.</i>	
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Decree—Decree for rent—Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits.—Mortgagee's right to execute decree for rent.] In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal:—

Held, that the rent Decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set off.

MUGAPPA v. MAHAMADSAHIB ... (1909) 34 Bom. 260

Decree—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed—Limitation Act (XV of 1877), art. 179, cl. 4.

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Limitation Act (XV of 1877), art. 179—Decree—Execution made conditional upon payment of Court fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law.

See LIMITATION ACT ... 189

Pensions Act (XXIII of 1871), secs. 6, 8, 11—Tōda giras allowance—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance—Certificate of Collector.

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EXECUTION—*Suit upon mortgage—Mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Decree—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members—Transfer of Property Act (IV of 1882), sec. 85.*

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—OF DECREE—*Civil Procedure Code (Act XIV of 1882), secs. 241, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under sec. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.] C sued M on a money-bond. M having died during the pendency of the suit, his widow R and his brother N were brought by C on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree, but before it could be executed, both R and N died. C then brought on the record the defendants as the legal representatives of M. The latter denied that they were M's legal representatives or that they had any property of M's which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of M and defendants' survived to the latter at M's death: and that the plaintiff obtained no title at the Court-sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of section 214 of the Code of Civil Procedure, 1882, from asserting their title.*

Held, that as the property was sold by the Court at C's instance as that of M, the question so far was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under section 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within section 241 of the Code by reason of the explanation to section 647 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned.

It was contended that whatever might have been the result, if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that section 244 did not apply:—

Held, that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit.

The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

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FAMILY PROPERTY, DIVISION OF, UNDER AN AWARD—*House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective.] An award under which family property was divided among co-sharers provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for a certain sum and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. Subsequently a portion of the house belonging to one co-sharer having been sold in execution of a decree against him, it was purchased by an outsider. The sons of one of the other co-sharers, thereupon, having brought a suit for a declaration that the Court-sale was not binding upon them,*

Held, that the term of pre-emption in the award was contemplated to attach to sales made privately and willingly and not to attachment and sales *in invitum* the judgment-debtor.

VITHAL NABAYAN v. MARUTI NARAYAN ... (1910) 34 Bom. 567

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GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 9— <i>Application for guardianship of minor—Jurisdiction—Domicile—Place where the minor ordinarily resides.] One Panachand, a Jain inhabitant of Kapadwanj in the Ahmedabad District, lived in his house at that place. He died leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, who all lived in the house. Panachand's widow died about a year after him. Thereupon Panachand's house and a shop at Kapadwanj were sold and Lallu with his minor brother Wadilal went to Baroda in May 1906. At Baroda Lallu embraced Christianity and placed his minor brother, who was also baptized, in the American Mission Boarding House at that place. Afterwards Lallu renounced Christianity and in the beginning of February 1909 clandestinely removed his minor brother from the Mission Boarding House at Baroda and placed him in the Jain Boarding House at Ahmedabad. The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was removed from Ahmedabad at the instance of the appellant, a member of the American Mission at that place, and taken to Baroda. On the 28th April 1909 Lallu presented an application to the District Court at Ahmedabad for his appointment as the guardian of the minor's person. The appellant (opponent), at whose instance the minor was taken back to Baroda, contended that inasmuch as the minor lived at Baroda which was beyond the Court's jurisdiction, the Court had no jurisdiction to entertain Lallu's application under section 9 of the Guardians and Wards Act (VIII of 1890). The Court dismissed Lallu's application, he being found unfit for the appointment, but in the same proceeding appointed the respondent, a Jain pleader, on his application, as</i>	

the guardian of the minor's person and property, on the ground that as the minor lived with his father till the father's death at Kapadwanj which was within the jurisdiction of the Court and as the minor's domicile followed that of his father which was Kapadwanj, the minor's domicile was in British India and he ordinarily resided within the Court's jurisdiction.

Held, on appeal by the opponent, setting aside the order, that the question of domicile was wholly irrelevant to the question of jurisdiction. The minor was living at Baroda and had no other place of residence. He had lived at Baroda for three years with the exception of twenty-eight days. Therefore Baroda was the place where the minor ordinarily resided within the meaning of section 9 of the Guardians and Wards Act (VIII of 1890).

ROBERT WARD (Rfv.) v. VELCHAND ... (1909) 34 Bom. 121

GUARDIAN, POWER OF—*Limitation Act (XV of 1877), sec. 8, sch. II, art. 179, expl. I—Limitation Act (IX of 1908), sec. 7—Minor decree-holders—Application for execution by guardian—Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge to the judgment-debtor in respect of the judgment-debt.*

See LIMITATION ACT (XV OF 1877), SEC. 8, SCH. II, ART. 179, EXPL. I. 672

—, APPLICATION FOR EXECUTION BY—*Limitation Act (XV of 1877), sec. 8, sch. II, art. 179, expl. I—Limitation Act (IX of 1908), sec. 7—Minor decree-holders—Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge to the judgment-debtor in respect of the judgment-debt.*

See LIMITATION ACT (XV OF 1877), SEC. 8, SCH. II, ART. 179, EXPL. I. 672

GUJARAT TALUKDAR'S ACT (BOM. ACT VI OF 1883), SECS. 28, 29B AND 29E—*Civil Procedure Code (Act XIV of 1882), secs. 235, 320—Decree against Talukdār—Execution—Decree transferred to Talukdārī Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under sec. 29E of the Gujarāt Talukdār's Act (Bom. Act VI of 1883)—Managing Officer—Talukdārī Settlement Officer.]* When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of section 235 of the Civil Procedure Code (Act XIV of 1882).

Hinachand Harjivandas v. Kasturchand Kasidas (1893) 18 Bom. 224, explained.

The effect of section 29E of the Gujarāt Talukdār's Act (Bom. Act VI of 1883) is that before the execution of a decree can be proceeded with, the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of section 29B of the Gujarāt Talukdār's Act (Bom. Act VI of 1883) it may then proceed with the execution.

The expression "managing officer" in section 29E of the Act is merely a compendious term for "the Talukdārī Settlement Officer or any other officer appointed by Government to take charge of the Talukdār's estate and keep the same in his management" referred to in section 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdārī Settlement Officer, the "managing officer" is merely a synonym for "Talukdārī Settlement Officer."

Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdāri Settlement Officer, it amounts to a submission of the claim in writing within the meaning of section 29B of the Act, if the Talukdāri Settlement Officer is also the managing officer.

PURUSHOTTAM v. RAJBAL ... (1909) 34 Bom. 142

HEREDITARY OFFICES ACT (BOM. ACT III OF 1874), secs. 25, 36—*Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.* Section 25 of the Hereditary Offices Act (Bom. Act III of 1874) imposes the duty upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is maintainable under section 36 of the Act notwithstanding that it is manifest that the declaration is sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

RAHIMKHAN v. DADAMIYA ... (1909) 34 Bom. 101

HIGH COURT—*Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898), sec. 435—Indian Penal Code (Act XLV of 1860), secs. 511, 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.* It is the settled practice of the High Court of Bombay to refuse to interfere, in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the misconstruction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence.

Queen-Empress v. Sheikh Saheb Badrudin (1888) 8 Bom. 197; *Queen-Empress v. Mahomed Hasan* (1886) Unrep. Cri. Cas. 244; and *Queen-Empress v. Chagan Dayaram* (1890) 14 Bom. 331, followed.

Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.

An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article. It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public.

In cases of sedition, the question of intention is one of fact.

EMPEROR v. GANESH BALVANT MODAK ... (1909) 34 Bom. 378

HINDU LAW—*Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), art. 120.* Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs.

The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir.

RAYJI TALAD MAHABU v. SAKUJI TALAD KALOTI ... (1909) 34 Bom. 321

HINDU LAW—*Adoption*—*Mother's sister's son also father's brother's son.*] The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son.

The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither Sapindas nor Sagotras.

Ramchandra v. Gopal (1908) 32 Bom. 619, followed.

WALBAI v. HEERBAI ... (1909) 34 Bom. 491

Alienation by widow—Consent by the body of reversioners—Transfer for legal necessity—Transaction for consideration—Gift—Partial relinquishment by widow.] The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the persons who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity.

Bajrang Singh v. Manokarnika Bakhsh Singh (1907) 30 All. 1 and *Vinayak v. Govind* (1900) 25 Bom. 129, followed.

The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate.

PILU v. BABAJI ... (1909) 34 Bom. 165

Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor coparcener—Liability of minor coparcener in suit on promissory notes.] One H. persuaded N. who was the only adult male member of a joint Hindu firm carrying on an ancestral trade to sign certain promissory notes in the name of his ancestral firm. N. signed the notes without the knowledge of the other member of the firm and without any advantage to the firm. The notes were subsequently endorsed by H. to B. who advanced moneys on them to H.

On a suit by B. to recover the amount due on the notes from N.'s firm K., a minor coparcener, pleaded that he was not liable.

Held, varying the decree of Heaton, J., that the minor's share in the firm was liable.

Per CHANDABEKKAR, J.—Under Hindu law a joint family, which carries on a trade handed down from its ancestors, becomes a trading family; trade being one of its *kulacharas* (duty or practice) it attracts to itself all the necessary incidents of trade.

The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family.

Where a minor is a coparcener in a joint family his *share* in the family property is liable for debts contracted by his managing coparcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm,

the same rule must apply with this difference that the terms *family purpose* or *purposes incidental to it* must have given way for the expression *trading purpose* or *purpose incidental to it* having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family, trading as a firm, necessary for its existence and its purposes. The minor's share is therefore bound by it since it constitutes an obligation of the firm.

Per BATCHELOR, J.—In establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. The test to be applied in cases of this kind is rather the apparent authority of the manager than the actual necessity of the family, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade.

RAGHUNATHJI TARACHAND v. THE BANK OF BOMBAY ... (1909) 34 Bom. 72

HINDU LAW—*Maintenance—Maintenance allowed by will of husband to wife—Unchastity of wife after husband's death—Maintenance not affected—Widow—Unchastity—Starving maintenance.*] A Hindu widow was entitled to maintenance at the rate of Rs. 24 a year under her husband's will. After the husband's death, the widow led for some time an unchaste life and gave birth to a child; but since then she remained chaste. She sued to recover maintenance allowed to her under her husband's will. It was contended in reply that the plaintiff, on account of the unchaste life which she had led for some time after her husband's death, had forfeited her right even to bare or starving maintenance.

Held, negating the contentions, that though the annuity was granted by the will as "maintenance" that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will.

The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship.

The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rights, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence.

Honamma v. Timannabhat (1877) 1 Bom. 559; *Valu v. Ganga* (1882) 7 Bom. 84; and *Vishnu Shambhog v. Manyamma* (1884) 9 Bom. 108, discussed.

PARAMI v. MAHADEVI ... (1909) 34 Bom. 278

—*Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants-in-common*] In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely.

When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship between them.

In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject.

VITHAPPA v. SAVITERI ... (1910) 34 Bom. 510

HINDU LAW—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.] The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree : but were they differ, the Mayukha law must prevail

The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse.

The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belonged to a respectable family.

JAGANNATH RAGHUNATH v. NARAYAN ... (1910) 31 Bom. 553

Nibandha—Gift—Sale—Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Registration Act (III of 1877), sec. 17—Transfer of Property Act (IV of 1882), secs. 55 (6) (b), 123.

See TRANSFER OF PROPERTY ACT ... 287

Partition—Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch—Self-acquisition.] Certain family property was allotted to a member of one branch of the family in virtue of a compromise. It was subsequently purchased by a member of the other branch with his own money which was not part of the joint family money. The purchaser did not intend by the purchase to merge the property in the joint family property and excluded his brother from it.

Subsequently the brother having brought a suit for partition claimed a share in the property purchased by the defendant along with a share in the other joint property.

Held, that the plaintiff was not entitled to claim a partition subject to the right of the defendant to retain an additional quarter share for himself, but that the property purchased by the defendant became his self-acquisition.

BAJABA v. TRIMEAK VISHVANATH ... (1909) 34 Bom. 106

Succession—Stridhan—Anvadheya—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha.] A Hindu female, governed by the Mayukha, died leaving property which she inherited from her father, under a deed of gift subsequent to her marriage. She left her surviving three daughters and one son. A dispute as to succession having arisen :—

Held, that the property being *anvadheya* stridhan, should be divided equally among the son and daughters : with this difference, however, as to the latter, that the unmarried should have preference over the married.

Ashabai v. Haji Tyeb Haji Rahimtulla (1882) 9 Bom. 115 and *Sitabai v. Wasantrao* (1901) 3 Bom. L. R. 201, followed.

DATALDAS LALDAS v. SAVITRIBAI ... (1909) 34 Bom. 385

WILLS ACT (XXI OF 1870), SECS. 2 AND 5—Indian Succession Act (X of 1865), sec. 187—Administrator-General's Act (II of 1874), sec. 36—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.] A will made in Bombay is subject to the provisions of the

Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by section 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870).

The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of section 187 of the Indian Succession Act (X of 1865).

NARAYAN SHRIDHAR v. PANDURANG BAPUJI ... (1910) 34 Bom 506

INAM—Saranjam—Miras (permanent tenancy)—Denial of Saranjamdar's title—Attornment to successive Saranjamdars—Estoppel—Claim to hold as Mirasi tenant—Limited interest—Adverse possession.

See SARANJAM ... 329

——COMMISSIONER, DECISION OF—Land held as saranjam—Exclusion of jurisdiction of Civil Courts—Revenue Jurisdiction Act (X of 1876), sec. 4, sub-sec. (a)—Act XI of 1852.

See REVENUE JURISDICTION ACT ... 232

——LAND—Bombay Land Revenue Code (Bom. Act V of 1879), secs. 3 (11) and 217—Survey Settlement introduced into Inam village—Inamdar's name entered as Khatedar—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent.

See LAND REVENUE CODE (BOM. ACT V OF 1879), SECS. 3 (11) AND 217 ... 686

INAMDAR, RIGHT OF, TO ENHANCE RENT—Bombay Land Revenue Code (Bom. Act V of 1879), secs. 3 (11) and 217—Survey settlement introduced into Inam village—Inamdar's name entered as Khatedar—Permanent tenant of the Inamdar before the settlement.

See LAND REVENUE CODE (BOM. ACT V OF 1879), SECS. 3 (11) AND 217 . 686

INDIAN COMPANIES ACT (VI OF 1882), SECS. 128, 129, 130 AND 131—Winding up petition—Petitioner a creditor for amount not immediately payable—General financial position of company—Indian Companies Act (VI of 1882), secs. 128, 129, 130 and 131—Schemes of arrangement—Practice.] The definition of "debt" in section 130 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word "creditor". A "creditor" is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor.

If the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up.

If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors.

IN THE MATTER OF INDIAN COMPANIES ACT, IN THE MATTER OF THE BOMBAY COTTON MANUFACTURING COMPANY AND IN THE MATTER OF BATHAL KARSODAS ... (1909) 34 Bom. 533

INDIVIDUAL COMMUNITY, RIGHT OF, TO USE PUBLIC ROAD—*Public road—Right of marching in procession with a car—Suit for declaration of right—Injunction restraining interference with the right.*

See PUBLIC ROAD, RIGHT TO USE ... 571

INHERENT POWERS—*Practice—Court—Compromise—Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside.*

See PRACTICE ... 408

INHERITANCE, RULE OF—*Hindu Law—Mutakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants-in-common.* In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject

See DAUGHTERS, INHERITANCE OF ... 510

INJUNCTION—*Public road—Right of marching in procession with a car—Suit for declaration of right—Injunction restraining interference with the right.*

See PUBLIC ROAD, RIGHT TO USE ... 571

INSURANCE, FIRE—*Liability of Company for further loss.*

Per CHANDAVARKAR, J.—The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance case) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred.

Montoya v. London Assurance Company (1851) 6 Ex. 451 at p. 458, referred to.

Per BATCHELOR, J.—The loss insured against is limited to the loss by fire (which includes the loss by water in extinguishing the fire) and cannot conveniently embrace all possible damages, however remote, which could by ingenuity be traced up to some connection with the fire as the ultimate *causa sine qua non*. It is impossible to hold that damages arising from the alleged negligence of Insurance Companies while in possession are properly claimable in pursuance of the contract of insurance, for whereas this contract refers only to loss by fire, those damages would arise from an origin totally different and wholly distinct and separable from the fire, namely, a neglect of some duty imposed on the companies after the loss by fire or water had become an accomplished fact.

ATLAS ASSURANCE COMPANY, LIMITED v. AHMEDBHAI HABIBBHAI...

(1908) 24 Bom. 1

INTENTION—*Indian Penal Code (Act XLV of 1860), secs. 511, 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.*

See HIGH COURT ... 378

INVESTIGATING POLICE OFFICER, DEPOSITION MADE TO—*Criminal Procedure Code (Act V of 1898), secs. 162, 288—Indian Evidence Act (I of 1872), secs. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer*

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<i>Deposition of as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.</i>	
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JOINDER OF PARTIES— <i>Non-joinder of some of the partners—Suit cognizable by Small Causes Court brought in High Court—Practice—Jurisdiction.</i>	
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JUDGMENT— <i>Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Appeal—Construction of submission to arbitration—Letters Patent, 1865, cl. 15.</i>	
See LETTERS PATENT	1
JUDGMENT-DEBTOR— <i>Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective.</i>	
See PRE-EMPTION	567
JURISDICTION— <i>Aden Act (II of 1864), secs. 8 and 15—Court-fees Act (VII of 1870), sec. 7, sub-sec. 4, cls. (c) and (d)—Suits Valuation Act (VII of 1887), sec. 8—Civil Procedure Code (Act XIV of 1882), sec. 551—Civil Procedure Code (Act V of 1908), sec. 115—Valuation for the purposes of Court-fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision.] The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards Rs. 50,000. The claim being for declaration and injunction was, under the provisions of the Court-fees Act (VII of 1870), section 7, sub-section 4, clauses (c) and (d) valued by the plaintiff at Rs. 130 upon which the prescribed Court-fee stamp was Rs. 10 only. The Assistant Resident rejected the plaint on the ground that it was not properly stamped.</i>	
Against the order of the Assistant Resident the plaintiff appealed to the Resident at Aden, and on the 23rd September 1903 presented an application under section 8 of the Aden Act (II of 1864) to state a case to the High Court upon certain questions specified in the application. The Resident, however, on the next day, that is, on the 24th September summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). The judgment dismissing the appeal was read out to the plaintiff on the 7th October following, when she attended the Court.	
The plaintiff, thereupon, preferred an application for revision to the High Court praying that the order dismissing the appeal might be quashed and that the Resident be required to state a case.	
A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864),	
<i>Held</i> , that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of section 8 of the Aden Act (II of 1864) the Resident's Court is subordinate to the High Court.	
Under section 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter and in the High Court in the exercise of its	

jurisdiction as a Court of Appeal from those Courts, the provisions of the Suits Valuation Act (VII of 1887) are 'the law for the time being for the valuation of claims' in the Courts of the Resident of Aden.

Held, further, that the plaintiff's claim being valued at Rs. 130 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court, it did not fulfil the requirements of section 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit.

RHIMBAI JAMALBOHY v. MARIAM BINTE ABDUL ... (1909) 34 Bom. 267

JURISDICTION—*Application for guardianship of minor—Domicile—Place where the minor ordinarily resides—Guardians and Wards Act (VIII of 1890), sec. 9.*

See GUARDIANS AND WARDS ACT ... 121

Hereditary Offices Act (Bom. Act III of 1874), secs. 25, 36—Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration.

See HEREDITARY OFFICES ACT ... 101

Land held as saranjam—Decision of the Indm Commissioner—Finality—Suit for declaration of title and possession—Revenue Jurisdiction Act (X of 1876), sec. 4, sub-sec. (a)—Act XI of 1852.

See REVENUE JURISDICTION ACT ... 232

Letters Patent, clauses 12 and 14—Cause of action arising partly within jurisdiction—Further cause of action arising wholly outside jurisdiction—Joinder—Time of application.] An application under clause 14 of the Letters Patent to join a further cause of action arising wholly outside the jurisdiction, can be made in a case in which leave to sue has to be obtained under clause 12; nor is there anything in clause 14 to show that this application must be made before the plaint is filed. There is nothing to prevent the plaintiff making the application at any time before the hearing, but it would certainly be advisable for him to make it at the time the plaint is presented.

JOHN GEORGE DOBSON v. THE KRISHNA MILLS, LTD. ... (1910) 34 Bom. 564

Practice—Presidency Small Cause Courts Act (XV of 1882), sec. 22—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants' Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), sec. 93—Sale—Tender.] The Bombay United Rice Merchants' Association was a commercial body of which most of the principal rice merchants in Bombay were members. Its rules were printed and circulated and they prescribed a certain form of contract which was very generally used in Bombay. By these rules a Sub-Committee was nominated "to decide all disputes which may arise as to contracts and do all other business relating to contracts." It was also provided that the "exclusive authority" to decide all such disputes should be the said Sub-Committee and the Association and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and on the last day of the vaida should fix the vaida

rate (*i. e.*, the market rate of the day) on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association, but they employed agents in Bombay, who were members, to purchase rice for them and on the 24th November 1906 these agents bought from the defendants 1,840 bags of rice at Rs. 9 per bag deliverable at the *vaida* of Magshir Sud 1968 (*i. e.* from the 18th November 1906 to 30th November 1906). The contract which was in the printed form framed under the rules as above-mentioned contained the following clause—"This contract is made subject to the rules of the Bombay United Rice Merchants' Association. Each party is bound to act in accordance with the same." For delivery at this *vaida* a large number of the members of the Association had made contracts of sale. The plaintiffs and a few others were purchasers and they were apprehensive that in settling the *vaida* rate the interests of the buyers would be disregarded in favour of those of the sellers. They accordingly wrote to the President of the Association calling upon him to see that no interested person was allowed to act on the Sub-Committee for fixing the *vaida* rate. In accordance with the practice a general meeting of the Association was held on the 30th November 1906 at which after discussion a special Sub-Committee was appointed to fix the rate consisting only of three persons one of whom was not a member of the standing Sub-Committee and another of whom had large contracts of sale due at this *vaida*. This Sub-Committee fixed the rate at Rs. 8-11-0 per bag. The plaintiffs alleged that it should have been fixed at Rs. 9-2-0 or Rs. 9-4-0 per bag which was the real market rate of the day; that the rate fixed was dishonestly fixed in the interest of sellers; that the Sub-Committee was not constituted according to the rules, two members of it being ineligible, one because he did not belong to the standing Sub-Committee and the other because he was interested in fixing a low rate, and they contended that for these reasons (*inter alia*) they were not bound by the rate fixed. They had duly demanded delivery of the rice contracted for and the defendants failed to give delivery and the plaintiffs now sued for the difference between the contract price (Rs. 9) and the market price on the 30th November 1906. The sum claimed as damages was less than Rs. 1,000.

The defendants pleaded—

1. That having regard to section 15 of the Civil Procedure Code (Act XIV of 1882) and section 18 of the Presidency Small Cause Courts Act (XV of 1882) the suit was not maintainable in the High Court.

2. That certain alleged partners of the plaintiffs not being parties to the suit it should be dismissed for non-joinder.

3. That having regard to the rules of the Association which provided a remedy in case of disputes among its members and forbade their going to law, the plaintiffs were precluded from suing at law at all events until they had exhausted the remedies provided by the rules.

4. That the plaintiffs were bound by the *vaida* rate fixed by the Sub-Committee appointed by the Association.

Held, (1) That the High Court had jurisdiction and that the suit should proceed subject to the provisions as to costs contained in section 22 of the Presidency Small Cause Courts Act (XV of 1882).

(2) That the alleged partnership was proved, but nevertheless the suit could not be dismissed for non-joinder.

(3) That the plaintiffs were entitled to sue at law notwithstanding the provisions contained in the rules of the Association requiring all disputes to be submitted for decision to the Association and restricting the right of members to sue each other.

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(4) That at the meeting of the Association held on the 30th November 1906 the plaintiffs (through their agents) had consented to the appointment of a Sub-Committee of three persons to fix the *valida* rate and that they were therefore bound by the rate then fixed.

Any stipulation that the award of an arbitrator shall be accepted as final restricts the rights of contracting parties to invoke the aid of the ordinary Courts and to that extent is void.

The effect of section 28 of the Indian Contract Act (IX of 1872), section 21 of the Specific Relief Act (I of 1877), read with the related sections of the Indian Arbitration Act (IX of 1899) and of the Civil Procedure Code dealing with arbitration is that a person may not contract himself out of his right to have recourse to Courts of law but that in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts.

MULJI TEJING v. RANSI DEVRAJ

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... (1909) 34 Bom. 13

JURISDICTION—*Provincial Small Cause Courts Act (IX of 1887), secs. 16, 27, 32, sch. II, cls. (2) and (3)*—*Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal*] A suit for the recovery of Rs. 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes and the decree in such a suit is final under section 27 of the Provincial Small Cause Courts Act (IX of 1887).

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining the appeal. The respondent (plaintiff) urged that a second appeal lay: and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point.

Held, that the District Court had no jurisdiction to try the case and the conduct of the parties could not give it jurisdiction.

Ledgard v. Bull (1886) L. R. 13 I. A. 134 and *Meenakshi Naidoo v. Subramaniya Sastri* (1887) L. R. 14. I. A. 160, referred to.

Decree of the District Court reversed and that of the first Court restored.

DAVLATSINHEJI (MAHARANA SHRI) v. KACHAR HAMIR MON. (1909) 34 Bom. 171

—*Restitution of conjugal rights—Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Bombay Civil Courts Act (XIV of 1869), sec. 24—Suits Valuation Act (VII of 1887), sec. 11.*

See RESTITUTION OF CONJUGAL RIGHTS

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—*Civil Procedure Code (Act V of 1908), sec. 24—Bombay Civil Courts Act (XIV of 1869), Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction.*

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JURISDICTION OF CIVIL COURTS— <i>Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste-questions—Application of Indian Trusts Act (II of 1882), secs. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), sec. 151.</i>	
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KAMATHIS— <i>Hindu Law—Mitakshara—Mayukha—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.</i>	
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LAND ACQUISITION ACT (I OF 1894)—“LAND”— <i>Acquisition of outstanding interests where Government owns fee-simple.] Per CHANDAYARKAR, J.—To acquire a land [Sec. under the Land Acquisition Act] is not necessarily the same thing as to purchase the right of fee-simple to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like.</i>	
The definition given to the word “land” in section 3 (a) of the Act is not exhaustive The use of the inclusive verb “includes” shows that the legislature intended to lump together in one single expression— <i>viz.</i> “land”—several things or particulars, such as the soil, the buildings on it, any charges on it, and other interests in it, all of which have a separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require.	
<i>Per BATCHELOR, J.</i> —Government are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation, based upon the market value of the whole land, must be distributed among the claimants. In such circumstances there is no insuperable objection to adapting the procedure to the case on the footing that the outstanding interests, which are the only things to be acquired, are the only things to be paid for.	
IN THE MATTER OF THE LAND ACQUISITION ACT—THE GOVERNMENT OF BOMBAY <i>v.</i> ESUFALI SALEBHAI (1909) 34 Bom. 618
SEC. 18— <i>Compensation—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice.]</i> The income of a property whether actual or imaginary is no doubt one of the recognised starting points for a valuation, but it is a mistake to think that it is the only element to be taken into consideration.	
In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which accrue from their possession. Residential property—in the sense of property which a purchaser wishes to acquire for his own residence—is such a commodity.	
The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration.	

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It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal.

IN THE MATTER OF LAND ACQUISITION ACT. IN THE MATTER OF GOVERNMENT AND SUKHANAND ... (1909) 34 Bom. 486

LAND FOR AGRICULTURAL PURPOSES—*Government assessment on land—Land appropriated for agricultural purposes—Special user of land by stacking thereon timber in fair season—Construction of Statute—Bombay Land Revenue Code (Bom. Act V of 1879), sec. 48.*

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REVENUE CODE (BOM. ACT V OF 1879), SECS. 3 (11) AND 217—*Survey settlement introduced into Inam village—Inamdar's name entered as Khatedar—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent.* Section 217 of the Bombay Land Revenue Code (Bom. Act V of 1879) is not restricted in its application to registered occupants only: it invests "the holders of all lands" in alienated villages with the same rights and imposes upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages have.

The term "holder" as defined in clause 11, section 3 of the Land Revenue Code, is wide enough to include even a tenant who has entered into possession under an occupant.

NANABHAI BAJIBHAI v. THE COLLECTOR OF KAIRA ... (1910) 34 Bom. 686

LAW GOVERNING KAMATHIS IN BOMBAY—*Hindu Law—Mitakshara—Mayukha—Kamathis—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.*

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LEGAL PRACTITIONERS, DUTY OF—*Land Acquisition Act (I of 1894)—Compensation—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer—Practice.* It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal.

See LAND ACQUISITION ACT (I OF 1894) ... 486

REPRESENTATIVE—*Civil Procedure Code (Act XIV of 1882), secs. 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Legal representatives should put forward their claim under sec. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.*

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LESSEES, LIABILITY OF—*City of Bombay Municipal Act (Bom. Act III of 1888), sec. 305—Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of statutes.*

See BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 305 ... 593

LETTERS PATENT, CLS. 12 AND 14—*Cause of action arising partly within jurisdiction—Further cause of action arising wholly outside jurisdiction—Joinder—Time of application.* An application under clause 14 of the Letters Patent to join a further cause of action arising wholly outside the jurisdiction, can be made in a case in which leave to sue has to be obtained under

clause 12; nor is there anything in clause 14 to show that this application must be made before the plaint is filed. There is nothing to prevent the plaintiff making the application at any time before the hearing, but it would certainly be advisable for him to make it at the time the plaint is presented.

JOHN GEORGE DOBSON *v.* THE KRISHNA MILLS, LTD. ... (1910) 34 Bom. 564

LETTERS PATENT, 1865, CL. 15—*Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration.*] An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a judgment within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion.

ATLAS ASSURANCE COMPANY, LIMITED *v.* AHMEDBOY HABIBBOY ...
(1908) 34 Bom. 1

LICENSE—*Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary—City of Bombay Municipal Act (Bom. Act III of 1888), sec. 394—Indian Railways Act (IX of 1890), sec. 7.*

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LIEN—*Practice—Dissolution of partnership—Assets in the hands of receiver—Judgment—creditor—Charging order—Solicitor's lien for costs.*

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LIMITATION—*Civil Procedure Code (Act XIV of 1882), secs. 43 and 50—Transfer of Property Act (IV of 1882), sec. 90—Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realised not sufficient—Application for supplemental decree to recover balance by sale of other property—Putting forward allegations at a late stage.*

See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 90 ... 540

ACT (XV OF 1877), SECS. 5 AND 7—*Application to file an appeal in formâ pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), sec. 11.*] A suit filed in *formâ pauperis* was decided on the 10th February 1908. An application for leave to appeal in *formâ pauperis* was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, section 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *formâ pauperis* must be treated as an appeal, and that section 5, and not section 7 of the Limitation Act, applied to it.

Held, overruling the contention, that whether the application was treated as falling under section 5 or under section 7 of the Limitation Act, 1877, the result was the same. If it fell under section 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay after the period of limitation prescribed for the presentation of an appeal had expired. If, on the other hand, it be treated as an application and fell under section 7 of the Limitation Act, it was clearly

within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period.

The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and on the application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

CHINTAMAN VYANKATRAO v. RAMCHANDRA VYANKATRO ... (1910) 34 Bom. 589

LIMITATION ACT (XV OF 1877), SEC. 8, SCH. II, ART. 179, EXPL. I—*Limitation Act (IX of 1908), sec. 7—Minor decree-holders—Applications for execution by guardian—Attainment of majority by one decree-holder—Application by guardian takes effect in favour of all—Right of the major decree-holder to give discharge to the judgment-debtor in respect of the judgement-debt.* Two minor sisters, who were born in the years 1881 and 1887, obtained a decree against the defendants in May 1900. The minor decree-holders were represented by a guardian appointed by the Court. The said decree was confirmed by the High Court in appeal in March 1901. Subsequently the guardian presented applications for the execution of the decree in 1904, 1905 and 1906, and while the last application was pending the guardian died. Thereupon the decree-holders presented an application for execution as majors in 1908. The defendants contended that as the elder decree-holder had attained majority, the application by the guardian was, as to her, unauthorized and the execution of the decree was barred as against her. It was further contended that as the elder decree-holder could from the time of her attaining majority make an application and give a good discharge to the judgment-debtor for the decretal-debt without the concurrence of the minor, time had, therefore, run against both under section 8 of the Limitation Act (XV of 1877) or section 7 of the Limitation Act (IX of 1908).

Held that by reason of the first explanation of article 179 of the Limitation Act (XV of 1877) an application made by a representative of one of joint decree-holders takes effect in favour of all. Therefore, though the elder decree-holder had attained majority, the applications made by the guardian as the next friend of the minor decree-holder took effect in favour of both.

Held, further, that the contention under section 8 of the Limitation Act of 1877 or section 7 of the Limitation Act of 1908 was inconsistent with the decisions in *Govindram v. Tutia* (1895) 20 Bom. 383 and *Zamir Hasan v. Sundar* (1899) 22 All. 199, the applicability of which had not ceased owing to any change in the words of section 7 of the Limitation Act of 1908.

MANCHAND PANACHAND v. KESARI ... (1910) 34 Bom. 672

—SECS. 22, 28—*Civil Procedure Code (Act XIV of 1882), sec. 31—Civil Procedure Code (Act V of 1908), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiffs' claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decree.* Certain lands attached to a vatan belonged jointly to two brothers V. and D. In the year 1872 the lands were let by V. under a perpetual lease which was attested by D. D. predeceased V. In the year 1905 within twelve years from the death of V., his representatives brought a suit for the recovery of the lands let by V. They sought to recover the entire lands on the ground of eldership. The suit was brought against defendants

1a, 1b, and 1c as the heirs of the mortgagee of the lessee (the original 1st defendant), against defendants 2 and 3 as the heirs of the lessee and against defendants 4 and 5 as the heirs of D. The heirs of defendant 1 and defendants 2 and 3 defended the suit on the ground, *inter alia*, of limitation, the suit not having been brought within twelve years from the date of the lease. Defendants 4 and 5 did not contest the plaintiffs' claim. The first Court allowed the plaintiffs' claim to the extent of their share, namely, a moiety on the ground that their claim to that extent was not time-barred. On appeal by the plaintiffs and defendants 4 and 5 the latter of whom in appeal claimed their share, namely, the other moiety, the appellate Court awarded the other moiety to defendants 4 and 5.

On second appeal by the heirs of the mortgagee,

Held, affirming the decree, that the whole claim was within time. A Vatandar is entitled to alienate vatan lands for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

Where a lease of vatan property is effected by one joint owner with the consent of the other joint owner, the time for the recovery of the vatan property from the lessee runs from the date of the death of the survivor of the joint lessors.

Defendants 4 and 5 having sought to recover in appeal their share which they had not asked for in the first Court,

Held, allowing their claim that they being parties to the suit instituted within the twelve years during which their right to a share in the vatan property could be effectually determined, the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit.

A party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act (XV of 1877) apply.

Nagendrabala Debye v. Turapada Acharjee (1903) 35 Cal. 1065, concurred in.

Plaint and decree of the lower appellate Court amended by entering defendants 4 and 5 as co-plaintiffs.

NAISENH v. VAMAN VENKATRAO

... (1909) 34 Bom. 91

LIMITATION ACT (XV OF 1877), SCH. II, ART. 120—*Hindu Law—Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right.* Amongst Sudras governed by the Mitakshara an illegitimate son cannot inherit vatan collaterally in preference to legitimate heirs.

The right to sue for a declaration of heirship to a vatan does not accrue until the death of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir.

RAVAL VALAD MAHABU v. SAKUJI VALAD KALOJI

... (1909) 34 Bom. 321

SCH. II, ARTS. 131, 62—*Cash allowance—Arrears of cash allowance, suit to recover.* The plaintiff, the manager of the temple of Shri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants, the managers of the temple of Shri Madhukeshwar at Banawasi, a sum of Rs. 20 as arrears of a cash allowance (*astik*) which the former was entitled to receive from the property of the latter. The defendants admitted the title of the plaintiff to the allowance, but pleaded limitation as to the arrears for

two out of the six years. The lower Courts applied article 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal,

Held, that the claim was properly allowed.

A cash allowance of the nature as in the present case is, according to Hindu law, *nibandha* or immoveable property; where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due. But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right.

The important question is, who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and article 62 applies to the co-sharer who has received the payment.

SAKHARAM HARI v. LAXMIPRIYA TIRTHA SWAMI ... (1910) 34 Bom. 349

LIMITATION ACT (XV OF 1877), ART. 179—*Decree—Execution—Execution made conditional upon payment of Court-fees—Application for execution without payment—Dismissal—Second application with payment—Application made in accordance with law.* A decree was passed on the 30th June 1901 whereby partition of immoveable property was ordered: but the execution of the decree was made conditional on the payment of the proper Court-fees. On the 29th June 1903 an application to execute the decree was made, but it was dismissed and it was not accompanied by payment. A second application to execute the decree was presented on the 27th June 1906: it was accompanied by payment. The lower Courts dismissed it on the ground that it was time-barred inasmuch as the first application made in 1903 was not one in accordance with law as required by article 179 of schedule II to the Limitation Act, 1877.

Held, that the first application was made in accordance with law; for, upon that application, it was competent for the Court to order that the execution should begin on the Court-fees being paid within a certain date.

Held, further, that the second application was within time.

Per curiam:—An application for execution of a decree to be in accordance with law must ask for something *within* the decree and not *outside* it.

NATHUBHAI KASANDAS v. PRANJIVAN LALCHAND ... (1909) 34 Bom. 189

ART. 179, CL. 4—*Decree—Execution—Step-in-aid of execution—Applications for execution presented by assignee of decree-holder—Dismissal of the application for non-production of assignment deed.* A decree was passed on the 12th October 1894 and an application to execute it was made by the decree-holder on the 16th August 1897. The process fee not having been paid the application was struck off. The second application to execute the decree was presented on the 16th August 1900 by the assignee of the decree-holder; but

as he did not produce the assignment the application was struck off on the 27th October 1900. The third application was presented by a *mukhtyar* of the assignee on the 11th August 1903; but as neither the assignment nor the *mukhtyarnama* was produced it was struck off on the 9th October 1903. The *mukhtyar* presented a fourth application on the 19th December 1905. A notice was issued to the judgment-debtor under section 248 of the Civil Procedure Code (Act XIV of 1882) and the application was disposed of, the decree-holder agreeing to accept a payment of Rs. 45 from the judgment-debtor. On the 11th December 1906 the fifth application to execute the decree was filed. The lower Courts holding that the second and third applications could not be regarded as applications for execution made in accordance with law, dismissed the fifth application as barred by the law of limitation.

Held, that the present application was not barred, for the non-production of the *mukhtyarnama* and the assignment did not prove that they did not exist in fact.

Abdul Majid v. Muhammad Faizullah (1890) 13 All. 89, followed.

VINAYAK VAMAN v. ANANDA VALAD RAMJI ... (1909) 34 Bom. 68

LIMITATION ACT (IX OF 1908), ART. 106—*Suit for partnership accounts—Specific assets realised within period of limitation.*] If a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit cannot be allowed to proceed speculatively against any and every partnership asset which may have been realised by the defendant after dissolution and within the period of limitation.

Mervanji Hormusji v. Rustomy Burjorji (1882) 6 Bom. 628, distinguished.

AHMED SULEMAN v. BHAGWANDAS VISRAM AND Co. ... (1909) 34 Bom. 515

LUNATIC—*Guardian ad litem of a lunatic—Personal liability of guardian to pay costs incurred by unnecessary appeal—Costs.*

See COSTS ... 374

MAHOMEDAN LAW—*Acknowledgment of son—Illegitimate son—Zina—Son by adulterous intercourse cannot be legitimised.*] Under Mahomedan Law a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of *zina* (i. e., fornication, adultery or incest).

Muhammad Allahdad Khan v. Muhammad Ismail Khan (1888) 10 All. 289, followed.

MARDANSAHEB v. RAJAKSAHEB ... (1909) 34 Bom. 111

—*Wakf—Gift—Essential elements for validity—Power of revocation—General principles—Vested remainders*] In 1902 a Shia Mahomedan by deed conveyed certain immoveable property to himself and other trustees for himself for life and after his death for the payment of annuities to his widow and daughter and the balance to certain charities. Further clauses provided that on the death of his widow her annuity was to go to certain other charities and that on the death of his daughter a lump sum was to be given to her son. A further proviso reserved power to the settlor at any time to revoke all or any of the above trusts.

In 1908 he revoked the trust, and executed a mortgage of the property. In 1909 he died and receivers of his estate were appointed.

His daughter then filed a suit for a declaration *inter alia* that the revocation and subsequent mortgage were invalid, and that the original trusts still subsisted.

Held, that the conveyance in 1902 was invalid.

Looked at from the stand-point of the Mahomedan law-giver, a private trust would be no more than a private gift *inter vivos* through the medium of the third party, and therefore subject to all the conditions of a valid gift, but *quere* whether private trusts were known to Mahomedan law.

Banoo Begum v. Mir Abed Ali (1907) 32 Bom. 172, discussed and distinguished.

JAINABAI v. R. D. SETHNA ... (1910) 34 Bom. 604

MAINTENANCE—Hindu Law—Maintenance allowed by will of husband to wife—Unchastity of wife after husband's death—Maintenance not affected—Widow—Unchastity—Starving maintenance] A Hindu widow was entitled to maintenance at the rate of Rs. 24 a year under her husband's will. After the husband's death, the widow led for some time an unchaste life and gave birth to a child: but since then she remained chaste. She sued to recover maintenance allowed to her under her husband's will. It was contended in reply that the plaintiff, on account of the unchaste life which she had led for some time after her husband's death, had forfeited her right even to bare or starving maintenance.

Held, negating the contentions, that though the annuity was granted by the will as "maintenance" that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will.

The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship.

The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rights, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence.

Honamma v. Timannabhat (1877) 1 Bom. 559; *Valu v. Ganga* (1882) 7 Bom. 84; and *Vishnu Shambhog v. Manjamma* (1884) 9 Bom. 108, discussed.

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"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day, redeem our premises. Perhaps any one of us three might within the period pay off at one time the amount of rupees according to his share, you should allow redemption of the premises proportionately after receiving the amount and you should pass a receipt for the monies received."

In the year 1901 the mortgagee having brought a suit for the recovery of the mortgage debt by sale of mortgaged property, the first Court allowed the claim, but the appellate Court reversed the decree and dismissed the suit on the ground that where in the case of a usufructuary mortgage the mortgagor agrees to redeem by payment of the principal after a stated period, the mortgagee has no higher or better right than he has under a simple usufructuary mortgage.

Held, on second appeal by the plaintiffs, that the mortgage in suit was governed by clause 3, section XV of Regulation V of 1827, and there being nothing in the terms of the agreement between the parties which either expressly or by implication indicated that the property should not by means of a suit be applied in liquidation of the debt, the suit would lie.

The decree of the appellate Court reversed and that of the first Court restored.

Mahadaji v. Joti (1892) 17 Bom. 425 and *Ramchandra v. Tripurabai* (1898) P. J. p. 43, followed.

Shaik Idrus v. Abdul Rahiman (1891) 16 Bom. 303, *Sadashiv v. Vyankatrao* (1895) 20 Bom. 296 and *Krishna v. Hari* (1903) 10 Bom. L. R. 615, explained.

PARASHARAM v. PUTTAJIRAO ... (1909) 34 Bom. 128

MORTGAGE—*Endorsement releasing mortgaged property for consideration in cash*—*Registration*] An endorsement made by a mortgagee (on the back of the mortgage-deed) releasing the mortgaged property in consideration of a cash payment of Rs. 300 is a document which requires registration, and not being registered was not admissible in evidence either of the redemption of the property or of the real nature of the original transaction between the parties.

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NEGLECTENCE— <i>Of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations.] The fact that a door on a moving train is open is evidence, but not conclusive proof, of negligence on the part of the Railway Company.</i>	
Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence.	
In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage.	
The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened.	
DULLAPATI SAKHIBAS v. THE G. I. P. RAILWAY CO. ... (1909) 34 Bom. 427	

NEWSPAPER (INCITEMENTS TO OFFENCES) ACT (VII OF 1903), sec. 3—*Order—Forfeiture of press.*] Section 3 of the Newspaper (Incitements to Offences) Act, 1903, provides for the making of a conditional order declaring the printing press used for the purpose of printing or publishing the offending newspaper to be forfeited. The section refers to the whole of the press and no order could be made under it limited only to such portions of the press as were employed in printing the offending newspaper.

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PARTNERSHIP ACCOUNTS, SUIT FOR—*Limitation Act (IX of 1908), Art. 106—Specific assets realized within period of limitation.] If a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff in such a suit cannot be allowed to proceed speculatively against any and every partnership asset which may have been realized by the defendant after dissolution and within the period of limitation.*

Merwanji Hormusji v. Rustomji Burjorji (1882) 6 Bom. 628, distinguished.

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PAUPER, APPLICATION TO SUE AS—*Disqualification—Subject-matter of suit—Cause of action—Civil Procedure Code (Act V of 1908), Order XXXIII, Rules 1, 2 and 5.] A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property by the mortgagee, with an alternative claim for damages. The mortgagee, admitting there was a surplus due to the applicant after the mortgage-debt had been satisfied, paid Rs. 100 into Court, and contended that the applicant was not a pauper, and further that the applicant disclosed no cause of action.*

Held, that the applicant was a "pauper" within the meaning of the Explanation to Order XXXIII, Rule 1, of the Civil Procedure Code (Act V of 1908), but

that the allegations contained in the application did not disclose a cause of action.

Dwarkanath v. Madhavrao (1886) 10 Bom. 207, not followed.

FATMABAI v. DOSSABHOY RUSTOMJI UMRIGAR ... (1909) 34 Bom 638

PENAL CODE (ACT XLV OF 1860), SECS. 107, 108, 121, 124A—*Abetment—Sedition—Waging of war*] The accused published a book containing eighteen poems, of which four were the subject-matter of the charge. The general trend of the poems charged, as well the remaining ones in the book, evinced a spirit of blood-thirstiness and murderous eagerness directed against the Government, conveyed the urgency of taking up the sword, and made an appeal of blood-thirsty incitement to the people to take up the sword, form secret societies and adopt guerilla warfare for the purpose of rooting out the British rule.

Held, that the accused committed the offence of abetting the waging of war (section 121 of the Indian Penal Code), by the publication of the poems charged.

Held, further, that the Court was entitled to look into the poems other than those forming the subject-matter of the charge, for the purpose of finding out the intention of the writer and the design of the publication.

Per CHANDAVARKAR, J.—Under the Indian Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by section 121: that is, the abetting of waging of war is under the Code as much an offence of treason as the waging of war itself.

The word "abetment" is defined in section 107 of the Code and one of its meanings, as given there, is "instigating any person to do anything" This meaning is not excluded by anything that occurs in section 121. The general law is laid down in sections 107-120 of the Code. According to it, "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." This applies to the abetment of the waging of war against the King as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded and abetment which has failed, section 121 does away with that distinction so far as the offence of waging war is concerned, and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever. And that for this simple reason that such a crime more than any other must be sharply and severely dealt with at its very first appearance and nipped in the bud with a strong hand.

Per HEATON, J.—Under section 107 of the Indian Penal Code there may be an instigation of an unknown person.

The word "abet," as used in section 121 of the Code, has the same meaning as is given to it by section 107. The "abetment" meant by section 121 is not necessarily confined to abetment of some war in progress. There may be and usually is instigation of rebellion before rebellion actually begins; that kind of instigation is under the Code abetting waging war against the King.

So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war.

EMPHOR v. GANESH DAMODAR SAVARKAR ... (1910) 34 Bom. 394

SEC. 329—*Criminal Procedure Code (Act V of 1898), secs. 109, 123, 397—Concurrent sentences—Consecutive sentences.*

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PENAL CODE (ACT XLV OF 1860), SECS. 511, 124A—*Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.* Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.

An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article. It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public.

In cases of sedition, the question of intention is one of fact.

EMPEROR v. GANESH BALVANT MODAK

... (1909) 34 Bom. 378

PENSIONS ACT (XXIII OF 1871), SECS. 6, 8, 11—*Toda Giras allowance—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance—Certificate of Collector.* It was directed by a decree that the purchaser at a Court sale of a Toda Giras allowance should recover from the Collector the amount due for arrears of the allowance from the date of his purchase. An application to execute this decree was made in 1864, in consequence of which the decree-holder's name was entered in the Collector's books as the person entitled to the allowance in question, and the arrears up to 1864 were paid. In 1903, the decree-holder's heirs applied to the Court to recover the arrears of allowance that had remained unpaid since 1896. The Collector contended that the application could not be entertained in the absence of a certificate from the Collector under the provisions of section 6 of the Pensions Act, 1871.

Held, overruling the contention, that the power of the Collector under the Act had been exhausted and there was no discretion for that officer to exercise either under the Act or the rules, so far as the applicant's right to recover the arrears that had become due in the life-time of the last holder, was concerned.

Held, further, that if those amounts remained unpaid, the Collector held them for and on behalf of the last holder, as moneys due to him, and as moneys therefore recoverable on his death by his heirs independently of any question which might arise under the Pensions Act, 1871, or the rules framed thereunder.

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The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are "jointly liable in respect of each and all of such causes of action" and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendants must all "have a joint interest in the main question raised by the litigation" and that causes of action joined in one suit	

against several defendants must be causes of action in which "the defendants are all jointly interested."

It is not necessary that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary.

UMABAI v. BHAAU BALWANT ... (1908) 34 Bom. 358

PRACTICE—*Civil Procedure Code (Act V of 1908), O. I. r. 8—Suit filed by plaintiff representing body of creditors—Application to be made party—Administration suit.*

See ADMINISTRATION SUIT ... 420

—Court—Inherent powers—Compromise—Compromise assented to by pleader not specially authorised in that behalf—Decree in terms of compromise—Decree set aside.] In the course of a suit, a compromise was presented which was signed by the defendants' pleader who was not specially authorised in that behalf. The Court passed a decree in terms of the compromise. The defendant then applied to the Court to set aside the decree on the ground that he did not engage the pleader and that he had not authorised the pleader to compromise the suit. The Court set aside the decree and set down the suit for hearing.

Held, that it is the inherent power of every Court to correct its own proceedings where it has been misled.

Held, also, that under the circumstances, the compromise was not binding upon the defendant and the decree passed upon it was void as to him.

BASANGOWDA v. CHURCHIGIRIGOWDA ... (1910) 34 Bom. 408

—Dissolution of partnership—Assets in hands of receiver—Judgment-creditor—Charging order—Solicitor's lien for costs.

See SOLICITOR'S LIEN FOR COSTS ... 484

—High Court—Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898), sec. 435.

See HIGH COURT ... 378

—Hindu Law—Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants-in-common] In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject.

See DAUGHTERS, INHERITANCE OF ... 510

—Land Acquisition Act (I of 1894)—Compensation—Valuation of residential property—Elements to be considered—Evidence before Acquisition Officer.

See LAND ACQUISITION ACT (I OF 1894) ... 486

—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—Judgment—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss—Letters Patent, 1865, cl. 15.] The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other Companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration, but when the order which the Court passes is only an intimation to the arbitrators of its opinion on the question of their jurisdiction it is immaterial

whether all or some of the Companies are formally parties to the proceedings in appeal.

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As to the objection that even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to a signatory.

ATLAS ASSURANCE COMPANY, LIMITED, v. AHMEDBHoy HABIBBHoy ...
(1901) 34 Bom. 1

PRACTICE—*Suit against defendant on ground which failed not to be decreed on another ground—Application for leave to amend plaint after arguments heard in appeal disallowed—Res judicata.*] A suit brought against the defendants on one ground which fails should not be decreed against them on another ground which they had no opportunity of meeting.

After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character.

H. filed a suit in 1904 against A. and J., the drawer and indorser respectively of two hundies. At the time of filing the suit J. was dead.

H. obtained a decree against both defendants, which decree remained unsatisfied.

In 1905 H. filed a suit against the heirs of J. on the same two hundies.

Held, the earlier suit having been filed against the firm of J. and not against J. personally was a bar to the later suit.

BAYABAI v. HAJI NOOR MAHOMED ... (1908) 34 Bom. 244

— *Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rule—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), sec. 93—Sale—Tender—Presidency Small Cause Courts Act (XV of 1882), sec. 22.*

See JURISDICTION

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— *Third party procedure—Directions, refusal to give—Discretion.*] The general principle on which a Court will issue third party directions is :—

(1) that there must be a clear case of contribution or indemnity from the third party ;

(2) that all the disputes arising out of a transaction as between the plaintiff and the defendant and between the defendant and a third party can be tried and settled in one suit ; and

(3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party.

Under the rules now in force the third party cannot be cited so as to be bound by the trial of one particular question which is identical as between the plaintiff and the defendant and as between the defendant and the third party.

axter v. France (No. 2) [1895] 1 Q. B. 591, followed.

W. & A. GRAHAM & Co. v. CHUNILAL HARILAL & Co. ... (1903) 34 Bom. 423

PRACTICE—*Winding up petition—Petitioner a creditor for amount not immediately payable—General financial position of company—Indian Companies Act (VI of 1882), secs. 128, 129, 130 and 131—Scheme of arrangement.*

See WINDING UP PETITION

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—AND PROCEDURE—*Criminal Procedure Code (Act V of 1898), secs. 162, 288—Indian Evidence Act (I of 1872), secs. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before the Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief.*

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 162, 288

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PRE-EMPTION—*Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Construction—Court-sale—Prohibition not effective.] An award under which family property was divided among co-sharers provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for a certain sum and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. Subsequently a portion of the house belonging to one co-sharer having been sold in execution of a decree against him, it was purchased by an outsider. The sons of one of the other co-sharers, thereupon, having brought a suit for a declaration that the Court-sale was not binding upon them.*

Held, that the term of pre-emption in the award was contemplated to attach to sales made privately and willingly and not to attachment and sales in invitum the judgment-debtor.

VITHAL NARAYAN v. MARUTI NARAYAN

...

... (1910) 34 Bom. 567

PREMISES, WHAT ARE—*City of Bombay Municipal Act (Bom. Act III of 1888), sec. 305—Municipal Commissioner—Notice, disobedience of—Private streets—Licensing and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Construction of statutes.*

See BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 305

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PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), SECS. 37, 38—*Criminal Procedure Code (Act V of 1898), sec. 195—Sanction to prosecute—Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882), secs. 37, 38.] Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, a Full Court of that Court has no power to revoke the sanction.*

Per CHANDAVARKAR, J.—The language used in sections 37 and 38 of the Presidency Court of Small Causes Act (XV of 1882) does not appear to be appropriate for the purpose of conferring appellate jurisdiction upon the Full Court.

Per BATCHELOR, J.—The jurisdiction conferred by section 38 of the Act is not appellate, but revisional only.

SATYALAL PADMA, *In re*

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... (1909) 34 Bom. 316

PRESUMPTION AS TO FORM OF MARRIAGE—*Hindu Law—Mitakshara—Mayathis—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anathas—Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage.*

See HINDU LAW

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PRICE OF GOODS BARGAINED AND SOLD, SUIT FOR—Cause of action— <i>Indian Contract Act (IX of 1872), secs. 39, 73, 120—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), sec. 123.</i>	192
See CONTRACT ACT					

PRINCIPAL AND AGENT—Agent's power to bind his principal to arbitration.	13
See JURISDICTION					

Construction of Contract—Indian Contract Act (IX of 1872), secs. 215-216—Agent appointed to sell goods buying them on his own account. Section 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account of the latter. The principal is free to exercise that right or not.

The law is that where a party elects to adopt a transaction, he must take its benefit with its burden. He cannot, as is said, "both approbate and reprobate." But both the benefit and the burden must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election.

Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in section 215 of the Contract Act or to affirm it. If he elects to affirm, the principal will be liable to pay to the agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.

Salomons v. Pender (1865) 3 H. & C. 639 and *Andrews v. Ramsay & Co.* (1903) 2 K. B. 635, referred to.

JOACHINSON v. MEGHJEE VALLABHDAS	(1909) 34 Bom. 292
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PRIVATE STREETS, LEVELLING AND DRAINING OF—City of Bombay <i>Municipal Act (Bom. Act III of 1888), sec. 305—Municipal Commissioner —Notice, disobedience of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessees on the sites—Premises, what are—Construction of statutes.</i>
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PROBATE— <i>Hindu Wills Act (XXI of 1870), secs. 2 and 5—Indian Succession Act (X of 1865), sec. 187—Administrator-General's Act (II of 1874), sec. 36—Will made in Bombay—Property worth less than Rs. 1,000—Administrator- General's certificate.</i>
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<i>Limitation Act (XV of 1877), secs. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant —Excuse of delay—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), sec. 11.</i>
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PROBATE— <i>Probate and Administration Act (V of 1881), sec. 81—Indian Succession Act (X of 1865), sec. 250—Will—Caveator—Interest possessed by the caveator.</i>	
<i>See PROBATE AND ADMINISTRATION ACT (V OF 1881), SEC. 81</i>	... 459
—AND ADMINISTRATION ACT (V OF 1881), SEC. 81— <i>Indian Succession Act (X of 1865), sec. 250—Will—Probate—Caveator—Interest possessed by the caveator.</i> [The provisions of section 81 of the Probate and Administration Act, 1881 (which correspond with those of section 250 of the Indian Succession Act, 1865), enact that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate, but that the person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise.	
<i>Abhiram Dass v. Gopal Dass (1889) 17 Cal. 48, followed.</i>	
<i>PIROJSHAH BHIKAJI v. PESTONJI MEEWANJI</i>	... (1910) 34 Bom. 459
PROCESSION— <i>Public road—Right of marching in procession with a car—Suit for declaration of right—Injunction restraining interference with the right.</i>	
<i>See PUBLIC ROAD, RIGHT TO USE</i>	... 571
PROMISSORY NOTES— <i>Hindu family firm—Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor coparcener—Liability of minor coparcener in suit on promissory notes—Hindu law.</i>	
<i>See HINDU LAW</i>	... 72
PROVINCIAL SMALL CAUSES COURTS ACT (IX OF 1887), <i>secs. 16, 27, 32, SEC II, CLS. (2) AND (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—Jurisdiction by consent of parties.</i> [A suit for the recovery of Rs 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes and the decree in such a suit is final under section 27 of the Provincial Small Causes Courts Act (IX of 1887).	
<i>Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining the appeal. The respondent (plaintiff) urged that a second appeal lay; and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point.</i>	
<i>Held, that the District Court had no jurisdiction to try the case and the conduct of the parties could not give it jurisdiction.</i>	
<i>Ledgard v. Bull (1886) L. R. 13 I. A. 134 and Meenakshi Naidoo v. Subramanaya Sastri (1887) L. R. 14 I. A. 160, referred to.</i>	
<i>Decree of the District Court reversed and that of the first Court restored.</i>	
<i>DATPATISINHJI (MAHARANA SHRI) v. KHACHAR HAMIR MON...</i>	(1909) 34 Bom. 171
PUBLIC OFFICER— <i>Civil Procedure Code (Act V of 1908), secs. 2 (17), 80—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889), sec. 80 applies to actions ex delicto and not to actions ex contractu.</i>	
<i>See CANTONMENTS ACT (XIII OF 1889), SEC. 80</i>	... 583

PUBLIC ROAD, RIGHT TO USE—*Right of marching in procession with a car—Sut for declaration of right—Injunction restraining interference with the right.* [Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved]

On second appeal by the plaintiffs *held*, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege.

Sudgopacharnar v. A. Rama Rao (1902) 26 Mad. 376, followed.

BASLINGAPPA PARAPPA v. DHARMAPPA BASAPPA ... (1910) 34 Bom. 571

RAILWAY COMPANY, LIABILITY OF—*Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations.*

See CONTRIBUTORY NEGLIGENCE ... 427

RAILWAYS ACT (IX OF 1890), sfc 7—*City of Bombay Municipal Act (Bom. Act III of 1888), sec 394—Use by Railway Company of its premises for storing timber—License from the Municipal Commissioner for the use not necessary.* [The Agent of the G. I. P. Railway Company having been charged in the Presidency Magistrate's Court at the instance of the Bombay Municipality under section 394 (1) (d) of the City of Bombay Municipal Act (Bom. Act III of 1888) with having used the Company's premises for storing timber without a license granted by the Municipal Commissioner, the Presidency Magistrate recorded evidence and referred the following question under section 432 of the Criminal Procedure Code (Act V of 1898):—

"Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act (IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner to use premises in such a manner as is necessary for the convenient making, altering, repairing and using the Railway?"

Held, that no such license was necessary. Section 7 (1) of the Indian Railways Act (IX of 1890) authorizes the Railway Administration to do all acts necessary for the convenient making, maintaining, altering, repairing and using the Railway notwithstanding anything in any other enactment for the time being in force.

The storing of timber was necessary for the convenient making, &c., of the Railway line.

Under section 7, sub-section 2 of the Indian Railways Act (IX of 1890), the Governor General in Council and not the Municipal Commissioner has the control of the Railway Administration in the exercise of its powers under sub-section 1.

MUNICIPAL COMMISSIONER OF BOMBAY v. G. I. P. RAILWAY COMPANY ...
(1909) 34 Bom. 252

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RECEIVER, ASSETS IN THE HANDS OF— <i>Practice—Dissolution of partnership—Judgment-creditor—Charging order—Solicitor's lien for costs.</i>	
<i>See SOLICITOR'S LIEN FOR COSTS</i>	424
REDEMPTION, SUIT FOR— <i>Decree—Execution of decree—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent.</i>	
<i>See DECREE</i>	260
REGISTRATION ACT (III OF 1877), SECS. 17 AND 49— <i>Release—Document compulsorily registrable—Registration by mistake in a wrong book—Mistake not to affect parties—Document duly registered—Endorsement releasing mortgaged property for consideration in cash—Registration.] A release whereby a father transferred all his rights of ownership in his immoveable and moveable property in favour of his son was registered not in Book No. 1, but in Book No. 4, that is to say, not in the book kept for the registration of documents compulsorily registrable under section 17 of the Registration Act (III of 1877).</i>	
<p><i>Held</i>, that the release must be considered as having been duly registered. The father's property was capable of identification and the error of the registrar in registering the document in Book No. 4 should not be allowed to affect the parties prejudicially.</p> <p><i>Sorabji Edalji v. Ishwardas Jaggivandas</i> (1892) P. J. p. 5, followed.</p> <p>An endorsement made by a mortgagee (on the back of the mortgage-deed) releasing the mortgaged property in consideration of a cash payment of Rs. 300 is a document which requires registration, and not being registered was not admissible in evidence either of the redemption of the property or of the real nature of the original transaction between the parties.</p>	
<i>PARASHARAMPANT v. RAMA</i>	(1909) 34 Bom. 202
SEC. 17— <i>Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Sale—Gift—Hindu Law—Nibandha—Transfer of Property Act (IV of 1882), secs. 55 (6) (b), 123.</i>	
<i>See TRANSFER OF PROPERTY ACT</i>	287
REGULATION II OF 1827, SEC. 21— <i>Caste question—Civil Court Jurisdiction—Suit to be declared Ayya of Hiremath and to restrain defendant from so styling himself.] The plaintiff sued to obtain a declaration that he was entitled to the fees and privileges appertaining to the Hiremath at Kamalapur by reason of his title to be called the Ayya of that Hiremath, and to obtain a perpetual injunction to restrain the defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the defendant had assumed a name to which the plaintiff had the exclusive right, and that that assumption would enable, as it had enabled, the defendant to attract to himself a large number of the plaintiff's followers, and thereby appropriate to himself fees, which would otherwise have been paid to the plaintiff.</i>	
<p><i>Held</i>, that it was a claim to a caste office and to be entitled to perform the honorary duties of that office or to enjoy certain privileges and honors at the hands of the members of the caste in virtue of that office. It was a caste question not cognizable by a Civil Court.</p> <p><i>Held</i>, also, that the fact that there had been no allegation of any specific damage by reason of the assumption by the defendant of the name of Ayya of Hiremath, and also the admission that after all the result of the assumption</p>	

of that name would be merely to enable some of the followers of the plaintiff to go over to the defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the Court were to interfere in such cases, it would be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another.

GADIGEYA v. BASAYA ... (1910) 34 Bom. 455

REGULATION XVI OF 1827—*Transfer of Property Act (IV of 1882), sec. 43—Deshgat Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property—Mortgagee's claim to hold the property against the mortgagor's heir.*

See VATAN ... 175

RELEASE—*Document compulsorily registrable—Registration by mistake in a wrong book—Mistake not to affect parties—Document duly registered—Endorsement releasing mortgaged property for consideration in cash—Registration—Registration Act (III of 1877), secs. 17 and 49.*

See REGISTRATION ACT ... 202

REPRESENTATION—*Hereditary Offices Act (Bom. Act III of 1874), secs. 25, 36—Death of registered Vatanidar—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.*

See HEREDITARY OFFICES ACT ... 101

RES JUDICATA—*Capacity of parties—Matter substantially in issue—Civil Procedure Code (Act XIV of 1882), sec. 13.] The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court, but the Court of Appeal held that the property had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and be content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager.*

Held, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*.

If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882) section 13 does not apply.

HARGOVAN RAMJI v. MULJI HARJIVAN ... (1909) 34 Bom. 416

—*Limitation Act (XV of 1877), secs. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Civil Procedure Code (Act V of 1908), sec. 11.*

See LIMITATION ACT (XV OF 1877), SECS. 5 AND 7 ... 589

—*Practice—Suit against defendant on ground which failed not to be decreed on another ground—Application for leave to amend plaint after arguments heard in appeal disallowed.] A suit brought against the defendants on one ground which fails should not be decreed against them on another ground which they had no opportunity of meeting.*

After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character.

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H. obtained a decree against both defendants, which decree remained unsatisfied.

In 1905 H. filed a suit against the heirs of J. on the same two hundies.

Held, the earlier suit having been filed against the firm of J. and not against J. personally was a bar to the later suit.

BATABAI v. HAJI NOOR MAHOMED ... (1908) 34 Bom. 244

RESTITUTION OF CONJUGAL RIGHTS—*Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Bombay Civil Courts Act (XIV of 1869), sec. 24—Suits Valuation Act (VII of 1887), sec. 11.* A suit for restitution of conjugal rights, wherein the claim was valued by the plaintiff at Rs. 65, was instituted in the Court of the Second Class Subordinate Judge. The First Court decreed the claim; and on appeal the decree was confirmed. On second appeal it was contended that the First Court had no jurisdiction to try the suit.

Held, that the valuation of the claim by the plaintiff must be accepted for the purpose of jurisdiction, unless it was shown to have been made either from any improper motive or deliberately for the purpose of giving the Court a jurisdiction which in fact it had not.

Jan Mahomed Mandal v. Mashar Bibi (1907) 34 Cal. 352, followed.

JASODA v. CHHOTU ... (1909) 34 Bom. 236

REVENUE JURISDICTION ACT (X OF 1876), SEC. 4, SUB-SEC. (a)—*Act XI of 1852—Land held as Saranjam—Decision of the Inam Commissioner—Finality—Suit for declaration of title and possession—Exclusion of jurisdiction of Civil Courts.* In the year 1858 the Inam Commissioner decided that a certain estate was Saranjam of P. and not his Sarv Inam. On P.'s death in 1899 Government resumed the estate on the ground that it was Saranjam and re-granted it to V., one of P.'s grandsons. Subsequently the plaintiff, another grandson of P., brought a suit against the Secretary of State for India and V. for declaration of title and possession on the ground that the immoveable property in suit was plaintiff's Sarv Inam property and could not be taken from his possession by Government or its officers or re-granted to any one else.

Held:

1. That the decision of the Inam Commissioner was, by virtue of the provisions of Rule 2, Schedule A of Act XI of 1852, final as regards the land and interests concerned in the decision.

2. That after such final decision, the title and continuance of the estate must be determined under Schedule B, Rule 10 of the Act, under such rules as Government may find it necessary to issue from time to time.

3. That in accordance with those rules the estate was, on P.'s death, resumed by Government who re-granted it to V.

Held, further, that the suit having been against Government relating to land as Saranjam was excluded from the jurisdiction of the Civil Courts by the provisions of sub-section (a) of section 4 of the Revenue Jurisdiction Act (X of 1876).

KIMRAY GOVINDRAO v. SECRETARY OF STATE ... (1909) 34 Bom. 232

REVISION—*Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to the High Court—Summary dismissal of appeal.*

See JURISDICTION ... 267

RICE MERCHANTS ASSOCIATION RULES—*Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), sec. 93—Sale—Tender—Non-joinder—Practice—Suit cognizable by Small Causes Court brought in High Court—Jurisdiction.*

See JURISDICTION 13

SALE—*Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing vaida rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), sec. 93—Tender.*

See JURISDICTION 13

—*Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Gift—Hindu Law—Nibandha—Registration Act (III of 1877), sec. 17—Transfer of Property Act (IV of 1882), secs. 55 (6) (b), 123.*

See TRANSFER OF PROPERTY ACT 287

—*Transfer of Property Act (IV of 1882), sec. 54—Compromise—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary.*

See TRANSFER OF PROPERTY ACT 130

SALE-DEED—*Written agreement—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, &c.—Oral agreement cannot be pleaded—Evidence Act (I of 1872), sec. 92.*

See EVIDENCE ACT 59

SALE OF GOODS ACT (58 AND 57 VIC., C. 71), SECS. 45 AND 47—*Stoppage in transitu—Ultimate destination of goods—Duration of transit—Pledgee of bill of lading—Measure of damages.* The plaintiffs, a Bombay firm, imported hardware goods from M. & Co. of Manchester for sale on commission, the business being carried on and financed in the following manner. M. & Co., on shipping the goods, handed over the complete shipping documents to B, and received from him an advance of 65 per cent. of the invoice price. B then handed over the shipping documents to the National Bank of India in England, and himself received a similar advance by drawing on a credit opened with the Bank by the plaintiffs. The Bank then forwarded the shipping documents to India, where they were handed over to the plaintiffs in exchange for a trust receipt, the plaintiffs becoming responsible to the Bank for any short fall in the advances made to B.

On 12th February 1907 M. & Co. contracted to purchase from L. & Co. 250 boxes of tin plates, delivery to be F. O. B. Newport in four or five weeks after date. On 26th February M. & Co. wrote to L. & Co. enclosing instructions and marks for shipment of the 250 boxes to Bombay, and on 2nd March requested them to forward the goods to W. & Co. at Newport in time for shipment in S. S. Clan Macleod for Bombay. On 21st March L. & Co. enclosed to M. & Co. an invoice for 200 boxes and on 27th March another invoice for the remaining 50

boxes, the material part of the invoice in each case being "No claim concerning these goods can be recognized unless made within fifteen days from delivery to Messrs. W. & Co., Newport, for shipment on your account."

The 250 boxes were put on board the steamer by W. & Co. as the agents of L. & Co., but in obtaining a bill of lading for 500 boxes (including the 250 in question) W. & Co. acted as the agents of M. & Co.

The steamer left Newport on 4th April. Following the usual course of business as above described, M. & Co. handed over to B the shipping documents relating to the 500 boxes and obtained an advance of £255-5-2 (being 65 per cent. of the invoice value). B, on the 6th April, obtained a similar advance from the Bank. On the same day M. & Co. suspended payment, and on 9th April L. & Co., as unpaid vendors of 250 boxes, notified the steamship owners, the first defendants, to stop these goods in transit.

The S. S. Clan Macleod arrived in Bombay on 13th May, and the bill of lading which had been duly handed over by the Bank to the plaintiff on 29th April was in due course presented by the latter. They were informed, however, of the stop put on the 250 boxes and were offered a delivery order for the remaining 250 alone. This they declined, refusing to accept anything but the full payment of the advance or the full amount of the goods. On 29th June the plaintiffs repaid the Bank the amount of the advance, and the trust receipt of 29th April was duly cancelled.

On the plaintiffs subsequently suing the steamship owners and their agents for damages,

Held, that the transit did not cease at Newport, and L. & Co. were entitled to stop the goods after they had started for Bombay.

Ex parte Golding Davis & Co. (1880) 13 Ch. D. 628, followed.

Held, further, that the plaintiffs were, after 29th June,—on which date they had fulfilled their obligations to the Bank,—pledgees for value of the bill of lading, if indeed they did not occupy that position from 29th April, being transferees of the Bank's rights in respect of the advance as against the defendants.

Held, further, that the plaintiffs were entitled to join both defendants in the suit.

The utmost benefit which the defendants were entitled to obtain from the position of L. & Co. as sureties [So to the plaintiffs for the advance made by the latter to M. & Co.] was the right to the security of the 250 boxes which they were willing from the outset should be received by the plaintiffs..... The plaintiffs by refusing to take delivery of the 250 boxes had omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission had resulted in loss, the surety was discharged.

In re Westminster (1833) 5 B. & Ad. 817, discussed.

BAPUJI SONABJI & THE CLAN LINE STEAMERS, LIMITED ... (1910) 34 Bom. 640

SALE, PRIVATE AND IN INVITUM THE JUDGMENT-DEBTOR—Family property—Division under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court-sale—Prohibition not effective.

See PRE-EMPTION 567

SANCTION TO PROSECUTE—Criminal Procedure Code (Act V of 1898), sec. 195, 478—Subsequent order to prosecute passed under sec. 478.

See CRIMINAL PROCEDURE CODE 88

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SANCTION TO PROSECUTE— <i>Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882), secs. 37, 38—Criminal Procedure Code (Act V of 1898), sec. 195.</i>	
See CRIMINAL PROCEDURE CODE	316
SARANJAM— <i>Inam—Miras (permanent tenancy)—Denial of Saranjamdars' title—Attornment to successive Saranjamdars—Estoppel—Claim to hold as Mirasi tenant—Limited interest—Adverse possession.</i> In an ejectment suit brought by an Inamdar against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a Saranjam held on political tenure and that the present incumbent of the Saranjam was the plaintiff. The defendants resisted the plaintiff's claim to eject them on the ground that the Inam rights were merely the right to receive the royal share of the revenue and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, had descended to his heirs independently of the Inam and furnished the leasehold or Mirasi right.	
<i>Held</i> , that the defendants' contention involved the denial of the title to the reversionary rights in the lands in the defendants' occupation of the successive Saranjamdars approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive Saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title.	
<i>Vasudev Daji v. Babaji Ramu</i> (1871) 8 Bom. H. C. R. (A. C. J.) 175 and <i>Doe dem. Marlow v. Wiggins</i> (1843) 4 Q. B. 367, referred to.	
The rights of successive holders of hereditary and impartible estates not governed by the ordinary rules of inheritance but subject to the condition that Government shall approve of the heir may be barred by adverse possession.	
<i>Tekait Ram Chunder Singh v. Srimati Madho Kumari</i> (1885) L. R. 12 I. A. 197, referred to.	
Where in an ejectment suit by an Inamdar it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants,	
<i>Held</i> , that the defendants had acquired a title to the limited interest claimed by them and could not be ejected.	
TRIMBAK RANCHANDRA v. SHEKH GULAM ZILANI ... (1909) 34 Bom. 329	
Decision of the Inam Commissioner—Finality—Suit for declaration of title and possession—Exclusion of jurisdiction of Civil Courts—Revenue Jurisdiction Act (X of 1876), sec. 4, sub-sec. (a)—Act XI of 1852.	
See REVENUE JURISDICTION ACT	232
SEDITION— <i>Abetment—Waging of war—Indian Penal Code (Act XLV of 1860), secs. 107, 108, 121, 124A.</i>	
See PENAL CODE	391
Indian Penal Code (Act XLV of 1860), secs. 511, 124A— <i>Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.</i>	
See HIGH COURT	379

SELF-ACQUISITION—*Partition—Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch—Hindu Law.*

See HINDU LAW 106

SHETSANADI LANDS—*Rules framed under Act XI of 1852 (Bombay)—Government continuing the shetsanadi lands to the family of the shetsanadi who is discharged by Government without any fault on his part—Continuance on condition of paying full survey assessment on the lands—Subsequent resumption of the lands by Government.] On the death in 1865 of the then shetsanadi, one B, Government appointed one Y as the new shetsanadi; but under the rules framed under Bombay Act XI of 1852, Government continued the shetsanadi lands to the family of B on condition of their paying full survey assessment on the lands. The remuneration of Y was made payable out of the extra assessment recovered in 1905. Government resumed the lands and handed them over to Y for his services.*

Held, that both the orders passed in 1865 and the action taken under the rule framed under Bombay Act XI of 1852 had in law the effect of converting the land from a shetsanadi vatan into a rayatwari holding and investing the holder of the land with the rights of an ordinary occupant, entitled to it, so long as he paid the survey assessment.

Held, also, that the proceedings of 1905 were on the supposition that what was done in 1865 on B's death had the effect of continuing the lands in dispute as one reserved for shetsanadi service; but that was not its effect, and the proceedings in question were *ultra vires*.

YELLAPPA v. MARLINGAPPA (1910) 34 Bom. 540

SHUDRAS—*Hindu Law—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Forms of marriage—Presumption as to form of marriage.*

See HINDU LAW 553

SMALL CAUSES COURT—*Provincial Small Causes Courts Act (IX of 1887), secs. 16, 27, 32, sch. II, cls. (2) and (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—Jurisdiction by consent of parties.*

See PROVINCIAL SMALL CAUSE COURTS ACT 171

SMALL CAUSE COURT DECREE—*Civil Procedure Code (Act V of 1908), sec. 151—Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accordingly—Proceedings in the Small Cause Court and order for refund of that Court—Order not sustainable.*

See CIVIL PROCEDURE CODE 135

SOLICITOR'S LIEN FOR COSTS—*Practice—Dissolution of partnership—Assets in hands of receiver—Judgment creditor—Charging order.] The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or*

preserved by his exertions has always been followed by this Court; and, where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership.

Ridd v. Thorne (1902) 2 Ch. 344, followed.

Where a plaintiff has obtained a decree against a partnership firm, the available assets of which are in the hands of a receiver appointed in a previous partnership suit, his proper course is not to issue execution against those assets, but to ask the Court for a charging order, and to undertake to deal with the charge according to the order of the Court.

Kewney v. Atwill (1886) 34 Ch. D. 345, followed.

A. HAJI ISMAIL AND CO. v. RADIABAI ... (1909) 34 Bom. 484

SPECIFIC RELIEF ACT (I OF 1877), SEC. 42—*Civil Procedure Code (Act VIII of 1859), sec. 15—15 and 16 Vic., c. 86, s. 50—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.* A Talukdar-plaintiff brought a suit for a declaration that defendant 2, a minor, was not his son and that he was not born to the plaintiff's wife, defendant 1, and for an injunction restraining defendant 1 from proclaiming to the world that defendant 2 was plaintiff's son and from claiming maintenance for him as such son. The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877) and that it was premature.

Held, that the suit was maintainable, it being within the provisions of section 42 of the Specific Relief Act (I of 1877).

Held, further, that in the interest of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay, and when the controversy had once been brought to trial the decision should ordinarily follow the usual course.

Yool v. Ewing (1903) Ir. Rep. 1 Ch. 434, distinguished.

BAI SHRI VAKTUBA v. THAKORE AGARSINGHI RAISINGHI, (1910) 34 Bom. 676

SEC. 45—*General principle underlying interference by High Court—Municipal election petition—Jurisdiction and discretion of Chief Judge of Small Causes Court—City of Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), secs. 33 and 34.* A Municipal election petition having been lodged with the Chief Judge of the Small Cause Court, the latter unseated two of the successful candidates and found cause of objection against the candidate in whose favour were recorded "the next highest number of valid votes after those returned as elected." He declined to inquire further into the claims of any other candidate or to declare any other candidate elected, as, on his interpretation of section 33 (2) of the Bombay Municipal Act (Bom. Act III of 1888 as amended by Bom. Act V of 1905), he was not enabled to do so.

The two highest of the other unsuccessful candidates thereupon obtained rules against the Chief Judge under section 45 of the Specific Relief Act (I of 1877), to show cause why he should not proceed to declare them elected under section 33 (2) above mentioned.

Held, that the case fell within the general principle referred to in *Ex parte Milner* (1851) 15 Jur. 1037 that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would issue.

Section 33 having been held to empower the Chief Judge to set aside the election of any number of candidates returned as elected, there was nothing repugnant in construing the section as empowering the Chief Judge to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

It was clearly incumbent on the Chief Judge to deal with the question of filling up both the vacancies. He should accordingly proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection was found should be declared to be deemed to be elected. If only one qualified, or none qualified, proceedings for filling the vacancy or vacancies would have to be taken under section 34.

An application under section 33 (1) should name the persons whose election is objected to.

IN THE MATTER OF THE SPECIFIC RELIEF ACT, AND IN THE MATTERS OF
SARAFALLY MAMOOJI AND JAFFER JUSUR ... (1910) 34 Bom. 659

STATUTE, CONSTRUCTION OF—*Bombay Land Revenue Code (Bom. Act V of 1879), sec. 48.*] The Bombay Land Revenue Code (Bom. Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject.

SECRETARY OF STATE *v.* LALDAS ... (1909) 34 Bom. 239

—*City of Bombay Municipal Act (Bom. Act III of 1888), sec. 305—Municipal Commissioner—Notice, disobedience of—Private streets—Levelling and draining of—Liability of owners of several premises—Owners of building sites—Buildings constructed by lessors on the sites—Premises, what are.*

See BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1888), SEC. 305 ... 593

STATUTORY OBLIGATION, BREACH OF—*Negligence of Railway Company—Breach of statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligation.*

See CONTRIBUTORY NEGLIGENCE ... 427

STOPPAGE *IN TRANSITU*—*Ultimate destination of goods—Duration of transit—Pledge of bill of lading—Measure of damages—Sale of Goods Act (56 and 57 Vic., c. 71), secs. 45 and 47.*] The plaintiffs, a Bombay firm, imported hardware goods from M. & Co. of Manchester for sale on commission, the business being carried on and financed in the following manner. M. & Co. on shipping the goods, handed over the complete shipping documents to B, and received from him an advance of 65 per cent. of the invoice price. B then handed over the shipping documents to the National Bank of India in England, and himself received a similar advance by drawing on a credit opened with the Bank by the plaintiffs. The Bank then forwarded the shipping documents to India, where they were handed over to the plaintiffs in exchange for a trust receipt, the plaintiffs becoming responsible to the Bank for any short fall in the advances made to B.

On 12th February 1907 M. & Co. contracted to purchase from L. & Co. 250 boxes of tin plates, delivery to be F. O. B. Newport in four or five weeks after date. On 26th February M. & Co. wrote to L. & Co. enclosing instructions and marks for shipment of the 250 boxes to Bombay, and on 2nd March requested them to forward the goods to W. & Co. at Newport in time for shipment in S. S. *Chin Maudslayi* for Bombay. On 21st March L. & Co. enclosed to M. & Co. an invoice for 200 boxes, and on 27th March another invoice for the remaining

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The S. S. Clan Macleod arrived in Bombay on 13th May, and the bill of lading which had been duly handed over by the Bank to the plaintiff on 29th April, was in due course presented by the latter. They were informed, however, of the stop put on the 250 boxes and were offered a delivery order for the remaining 250 alone. This they declined, refusing to accept anything but the full payment of the advance or the full amount of the goods. On 29th June the plaintiffs repaid the Bank the amount of the advance, and the trust receipt of 29th April was duly cancelled.

On the plaintiffs subsequently suing the steamship owners and their agents for damages,

Held, that the transit did not cease at Newport, and L. & Co. were entitled to stop the goods after they had started for Bombay.

Ex parte Golding Davis & Co. (1880) 13 Ch. D. 628, followed.

Held, further, that the plaintiffs were, after 29th June,—on which date they had fulfilled their obligations to the Bank,—pledges for value of the bill of lading, if indeed they did not occupy that position from 29th April, being transferees of the Bank's rights in respect of the advance as against the defendants.

Held, further, that the plaintiffs were entitled to join both defendants in the suit.

The utmost benefit which the defendants were entitled to obtain from the position of L. & Co. as sureties [sc. to the plaintiffs for the advance made by the latter to M. & Co.] was the right to the security of the 250 boxes which they were willing from the outset should be received by the plaintiffs.... The plaintiffs by refusing to take delivery of the 250 boxes had omitted to do an act which their duty to the surety required them to do, and to the extent to which that omission had resulted in loss, the surety was discharged.

In re Westzinthus (1833) 5 B. & Ad. 817, discussed.

BAPUJI SORABJI v. THE CLAN LINE STEAMERS, LIMITED ... (1910) 34 Bom. 640

FRIDHAN—Anvadheya—Succession—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha—Hindu Law.

See HINDU LAW ... 385

Hindu Law—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.] The Kamathis, settled in Bombay, are

governed for the purpose of inheritance by the law of the Mitakshara and the Mayukha, where they agree: but where they differ, the Mayukha law must prevail.

The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse.

The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belonged to a respectable family.

JAGANNATH RAGHUNATH v. NARAYAN ... (1910) 34 Bom. 553

STRIDHAN—*Hindu Law—Mitakshara—Daughters inheriting from their father—Shares separate and absolute—Tenants-in-common.*] In the Bombay Presidency a daughter taking property inherits it as *stridhan* and daughters take their shares separately and absolutely.

See DAUGHTERS, INHERITANCE OF ... 510

SUCCESSION—*Hindu Law—Mitakshra—Mayukh—Kamathis—Law governing Kamathis who live in Bombay—Preferences between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.*

See HINDU LAW ... 553

—*Hindu Law—Sudras—Mitakshara—Legitimate son—Illegitimate son—Vatan—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), Art. 120.*

See HINDU LAW ... 321

—*Stridhan—Anvadhya—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha—Hindu Law.*

See HINDU LAW ... 385

—ACT (X OF 1865), SEC. 187—*Hindu Wills Act (XXI of 1870), secs. 2 and 5—Administrator-General's Act (II of 1874), sec. 36—Will made in Bombay—Property worth less than Rs. 1,000—Probate—Administrator-General's certificate.*] A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by section 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870).

The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of section 187 of the Indian Succession Act (X of 1865).

NARAYAN SHRIDHAR v. PANDURANG BAPUJI ... (1910) 34 Bom. 506

—SEC. 250—*Probate and Administration Act (V of 1881), sec. 81—Will—Probate—Caveator—Interest possessed by the caveator.*] The provisions of section 81 of the Probate and Administration Act, 1881 (which correspond with those of section 250 of the Indian Succession Act, 1865), enact that the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate; but that the person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise.

Abraham Dass v. Gopal Dass (1889) 17 Cal. 48, followed.

PERCIVAL BETHUNE v. PASTORI MERWANI ... (1910) 34 Bom. 459

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SUDRAS—*Mitakshara*—*Legitimate son*—*Illegitimate son*—*Vatan*—*Collateral succession*—*Suit by reversioner for declaration as nearest heir*—*Widow of the last male holder*—*Vested right*—*Limitation Act (XV of 1877), Art. 120*—*Hindu Law*.

See HINDU LAW ... 321

SUIT, SUBJECT-MATTER OF—*Application to sue as pauper*—*Disqualification—Cause of action*—*Civil Procedure Code (Act V of 1908), Order XXXIII, Rules 1, 2 and 5*.

See CIVIL PROCEDURE CODE (ACT V OF 1908), ORDER XXXIII, RULES 1, 2 AND 5 ... 638

SUITS VALUATION ACT (VII OF 1887), SEC. 8—*Suit for declaration and injunction—Valuation for the purposes of Court-fees and jurisdiction—Rejection of plaint as not properly stamped*.

See JURISDICTION ... 237

SEC. 11—*Restitution of conjugal rights—Valuation of claim—Jurisdiction of Second Class Subordinate Judge to entertain the suit—Bombay Civil Courts Act (XIV of 1869), sec. 24*.

See RESTITUTION OF CONJUGAL RIGHTS ... 236

SURVEY SETTLEMENT—*Bombay Land Revenue Code (Bom. Act V of 1879), secs. 3 (11) and 217—Survey settlement introduced into Inam village—Inamdar's name entered as Khatedar—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent*.

See LAND REVENUE CODE (BOM. ACT V OF 1879), SECS. 3 (11) AND 217 ... 686

TALUKDARS' (GUJARATH) ACT (BOM. ACT VI OF 1888), SEC. 31—*Talukdar's estate—Talukdari estate—Estate held by a Talukdar on any other tenure*.] The expression Talukdar's estate means only the estate held by a Talukdar on Talukdari tenure and not property held on any other tenure which is distinguishable from the former.

Khodabhai v. Chaganlal (1907) 9 Bom. L. R. 1122, followed.

BHAC RUPHA MAVSANGJI v. PATEL VELA DHANJI ... (1909) 34 Bom. 55

TENANTS-IN-COMMON—*Hindu Law—Mitakshara—Daughters inheriting property from their father—Shares separate and absolute*.] In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely.

When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship between them.

VITHAPPA v. SAVITRI ... (1910) 34 Bom. 510

TENDER—*Sale—Indian Contract Act (IX of 1872), sec. 93—Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of law—Rule providing for fixing valid rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rules—Principal and agent—Agent's power to bind his principal to arbitration*.

See JURISDICTION ... 13

THIRD PARTY—Practice—Third party procedure—Directions, refusal to give—Discretion.

The general principle on which the Court will issue third parties directions is :—

- (1) That there must be a clear case of contribution or indemnity from the third party,
- (2) that all the disputes arising out of a transaction between the plaintiff and the defendant and a third party can be tried and settled in one suit, and
- (3) that in cases of contract and sub-contract it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party.

Under the rules now in force the third party cannot be cited so as to be bound by the trial of one particular question which is identical as between the plaintiff and the defendant and as between the defendant and the third party.

Baxter v. France (No. 2) [1895] 1 Q. B. 591, followed.

W. & A. GRAHAM & Co. v. CHUNILAL HARILAL & Co. ... (190J) 34 Bom. 123

TITLE, QUESTION OF—Limitation Act (XV of 1877), secs. 5 and 7—Application to file an appeal in forma pauperis—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant—Res judicata—Civil Procedure Code (Act V of 1908), sec. 11.

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TODA GIRAS ALLOWANCE—Pensions Act (XXIII of 1871), secs. 6, 8, 11—Purchase of the rights to receive allowance at a Court sale—The allowance entered in the name of the purchaser—Application by heirs of the purchaser to receive arrears of allowance—Certificate of Collector.

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TORT—Negligence of Railway Company—Breach of Statutory duty—Injury to passengers with arm outside carriage window—Contributory negligence—Contractual obligations.

See CONTRIBUTORY NEGLIGENCE ... 427

TRADE—Hindu family firm—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor co-parcener—Liability of minor co-parcener in suit on promissory notes—Hindu law.

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TRANSFER OF APPLICATION—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction—Bombay Civil Courts Act (XIV of 1869), Part V—Civil Procedure Code (Act V of 1908), sec. 24.

See CIVIL PROCEDURE CODE ... 411

PROPERTY ACT (IV OF 1882), SEC. 43—Deshgud Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property—Mortgagee's claim to hold the property against the mortgagor's heir—Regulation XVI of 1827—A mortgagee of Deshgud Vatan knew that the property which

was mortgaged to him was land appurtenant to an hereditary office and inalienable beyond the life-time of the incumbent. Subsequently to the mortgage the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. After the enlargement the mortgagee having claimed to hold the property against the heir of the mortgagor,

Held, that the mortgagee took only such estate as the holder of the Vatan property was capable of conveying to the mortgagee at the time of the mortgage and that the mortgagee could not claim to retain the property in virtue of the mortgage after the death of the mortgagor.

GANGABAI v. BASWANT

...

...

... (1909) 34 Bom. 175

TRANSFER OF PROPERTY ACT (IV OF 1882), sec. 54—*Sale—Compromise—Land worth less than Rs. 100—Registration of deed, or delivery of possession not necessary.* The terms of a compromise affecting a claim to land of the value of less than Rs. 100 were reduced to writing. The document was not registered, nor was the transaction accompanied by delivery of possession. The material provisions of the deed were as follows:—

"You and we are co-sharers. In your and our land, Survey No. 20, there is a well. Therein you and we have a joint share. Partition is to be made including it. After the said (survey) number is divided, we shall give 9 *pands* more from our share and both of us should put up bandh (embankment) in the middle of the well, and possession and enjoyment should be carried on according to our respective shares. According to this condition we should not cause obstruction to each other. One who will act in contravention of this agreement will be able to reimburse loss which may be caused."

The lower appellate Court regarded the transaction as a sale which under the provisions of the Transfer of Property Act (IV of 1882) required delivery of possession in order to validate it.

Held, that the terms of the deed did not bring the transaction within the category of a sale, as defined in the Transfer of Property Act (IV of 1882).

Held, further, that the document in question merely embodied a compromise between the parties and was in effect an acknowledgment of existing rights; and that therefore no delivery of possession was necessary.

Rani Mawa Kuwar v. Rani Hulas Kuwar (1871) L. R. 1 I. A. 157, followed.

KRISHNA TANHAJI v. ABA SILTI PATIL

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... (1909) 34 Bom. 139

SECS. 55 (6) (b), 123—*Registration Act (III of 1877), sec. 17—Exemption of assessment in lieu of services rendered or to be rendered—Document granting exemption not stamped or registered—Sale—Gift—Hindu Law—Nibandha.* In consideration of services already rendered or thereafter to be rendered by the defendant to the predecessor-in-title of the plaintiff, the latter executed two documents whereby he released the defendant from payment to him of the assessment on certain lands. Those documents were not stamped or registered. The plaintiff sued to recover arrears of assessment from the defendant, who pleaded exemption under the two documents. The lower appellate Court found the transaction to be one of sale, and applying section 55 (6) (b) of the Transfer of Property Act, 1882, ordered the plaintiff to pay to the defendant what the Court calculated to be the equivalent of purchase-money before he (the plaintiff) could recover the assessment.

Held, that the transaction evidenced by the documents could not be regarded as a sale, for the consideration could not be regarded as "price"; and even if it could be assessed in money value, it was vitiated by the fact that it was vague and uncertain as to future services.

Held, further, that the transaction must be regarded as one of gift. It was a gift of the grantee's right to assessment; and such a right is regarded as *nibandha* in Hindu Law and therefore immoveable property. The documents not having been registered, the gift did not operate.

Held, also, that there having been no registered instrument in support of the defendant's title the right set up in defence must be negatived.

MADHAVRAO v. KASHIBAI

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... (1909) 34 Bom. 287

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 67—*Usufructuary mortgage—Debt payable within a fixed period—Expiry of the period—Mortgagee's right to an order for sale.*] Where under a usufructuary mortgage the mortgage debt is made payable within a fixed period, the mortgage is not purely a usufructuary mortgage and the mortgagee has, in the absence of a contract to the contrary, the right to an order under section 67 of the Transfer of Property Act (IV of 1882) that the property be sold after the debt has become payable.

Mahadaji v. Joti (1892) 17 Bom. 425 and *Krishna v. Hari* (1908) 10 B.M. L. R. 615, explained.

DATTAMBHAT RAMBHAT v. KRISHNABHAT

...

... (1910) 34 Bom. 462

SEC. 85—*Suit upon mortgage—mortgage executed by adult members of the family—Suit brought against all members excepting a minor—Decree—Sale of mortgaged property in execution—Minor seeking to exempt his share from sale—Representation of the minor by the adult members.*] A Hindu family living jointly consisted of S., his son M., and his two grandsons S¹ and R. (minors) by a predeceased son. S. mortgaged a house for purposes allowed by Hindu law. The deed of mortgage was signed by S., M. and S¹ represented by his mother. The mortgagee sued on the mortgage and joined S., M. and S¹ as party defendants. The suit passed into a decree, in execution of which the house was sold at a Court auction and purchased by the plaintiff. In a suit by the plaintiff against M., S¹ and R. (S. having died) for possession of the house, R. claimed to exempt from the sale his share in the house which was one-fourth, on the ground that as he was not a party to the suit, he was not bound by the decree.

Held, that though R. was omitted from the suit he was represented by the adult members, who were the managing members of the family.

Held, also, that the debt was contracted by S., the grandfather of R., and R. was bound by it unless it had been contracted for illegal or immoral purposes.

RAMKRISHNA v. VINAYAK NARAYAN

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... (1909) 34 Bom. 354

SEC. 90—*Civil Procedure Code (Act XIV of 1882), secs. 43 and 50—Suit to recover mortgage-debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realized not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage.*] In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realized by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under section 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor.

The first Court found that the claim for a personal decree against the mortgagor was time-barred.

On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant, but the appellate Court found that the plaintiff failed in his attempt and confirmed the decree.

On second appeal by the plaintiff *held*, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed.

Held, further that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally.

GULAM HUSSEIN v. MAHAMADALLI IBRAHIMJI ... (1910) 34 Bom. 549

TRANSIT, DURATION OF—*Stoppage in transitu—Ultimate destination of goods—Pledgee of bill of lading—Measure of damages—Sale of Goods Act (56 and 57 Vic., c. 71), secs. 45 and 47.*

See SALE OF GOODS ACT (56 AND 57 VIC., C. 71), SECS. 45 AND 47 ... 640

TRUST—*Mahomedan law—Wakf—Gift—Essential elements for validity—Power of revocation—General principles—Vested remainders.*

See MAHOMEDAN LAW 604

TRUSTS ACT (II OF 1882), SECS. 5 AND 6—*Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste-questions—Application of Indian Trusts Act (II of 1882), secs. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), sec. 151.]* As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan.

Held, that as trustees of the Derasar and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed.

Bank of Bombay v. Suleman (1908) 32 Bom. 466 at p. 474, referred to.

Held, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance.

Held, further, on the evidence, that there had been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed.

Held, further, that where rights to property are not involved all matters of internal management must be left to the decision of the caste.

The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such

it was outside the Court's jurisdiction in accordance with the decision in *Nemchand v. Savaichand* (1880) 5 Bom. at p. 84 F. N. *Lalji Shamji v. Walji Wardhman* (1895) 19 Bom. 507, referred to and distinguished.

Held, lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under section 151 of the Civil Procedure Code (Act V of 1908).

JETHABHAI NARSEY v. CHAPSEY DOOVERJI ... (1909) 34 Bom. 467

TRUSTEES OF CASTE FUNDS—*Caste—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste-questions—Application of Indian Trusts Act (II of 1882), secs. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), sec. 151.*

See TRUSTS ACT (II OF 1882), SECS. 5 AND 6 ... 467

UNCHASTITY—*Widow—Maintenance—Maintenance allowed by will of husband to wife—Unchastity of wife after husband's death—Maintenance not affected—Starving maintenance—Hindu Law.*

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UNHYPOTHECATED PROPERTY—*Civil Procedure Code (Act XIV of 1882), secs. 43 and 50—Transfer of Property Act (IV of 1882), sec. 90—Suit to recover mortgage-debt by sale of mortgaged and unhyponthecated property—Decree against mortgaged property alone—Sale—Amount realised not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage.*

See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 90 ... 540

USUFRUCTUARY MORTGAGE—*Transfer of Property Act (IV of 1882), sec. 67—Debt payable within a fixed period—Expiry of the period—Mortgagee's right to an order for sale.] Where under a usufructuary mortgage the mortgage-debt is made payable within a fixed period, the mortgage is not purely a usufructuary mortgage and the mortgagee has, in the absence of a contract to the contrary, the right to an order under section 67 of the Transfer of Property Act (IV of 1882) that the property be sold after the debt has become payable.*

Mahadaya v. Joti (1892) 17 Bom. 425 and *Krishna v. Hari* (1908) 10 Bom. L. R. 615, explained.

DATTAMBHAT RAMBHAT v. KRISHNABHAT ... (1910) 34 Bom. 462

Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property—Bombay Regulation (V of 1827), sec. XIV, cl. 3.

See MORTGAGE ... 128

VALUATION OF RESIDENTIAL PROPERTY—*Land Acquisition Act (I of 1894)—Compensation—Elements to be considered—Evidence before Acquisition Officer—Practice.] The income of a property whether actual or imaginary is no doubt one of the recognised starting points for a valuation, but it is a mistake to think that it is the only element to be taken into consideration.*

In the case of residential property to endeavour to arrive at the market value solely on the basis of an hypothetical rent may work grave injustice to the owner. There are commodities which may possess a value in the market not for the return they give on capital invested but for the advantages and enjoyment which

accrue from their possession. Residential property—in the sense of property which a purchaser wishes to acquire for his own residence—is such a commodity.

The first question to determine is whether there is a demand, and if there is a demand the original cost is the most important element for consideration.

It is the duty of legal practitioners attending before the Acquisition Officer to assist him in arriving at a valuation by putting before him all the information and materials at their disposal.

IN THE MATTER OF LAND ACQUISITION ACT. IN THE MATTER OF GOVERNMENT AND SUKHANAND ... (1909) 34 Bom. 486

VATAN—*Regulation XVI of 1827—Transfer of Property Act (IV of 1882), sec. 43—Deshgat Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property—Mortgagee's claim to hold the property against the mortgagor's heir.* A mortgagee of Deshgat Vatan knew that the property which was mortgaged to him was land appurtenant to an hereditary office and inalienable beyond the life-time of the incumbent. Subsequently to the mortgage the estate of the mortgagor was enlarged so as to be alienable in the life-time of the holder. After the enlargement the mortgagees having claimed to hold the property against the heir of the mortgagor,

Held, that the mortgagee took only such estate as the holder of the Vatan property was capable of conveying to the mortgagee at the time of the mortgage and that the mortgagee could not claim to retain the property in virtue of the mortgage after the death of the mortgagor.

GANGABAI v. BASWANT ... (1909) 34 Bom. 175

—*Limitation Act (XV of 1877), secs. 22, 28—Civil Procedure Code (Act XIV of 1882), sec. 31—Civil Procedure Code (Act V of 1906), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiffs' claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decree.*

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—*Sudras—Mitakshara—Legitimate son—Illegitimate son—Collateral succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), Art. 120—Hindu Law.*

See HINDU LAW ... 321

VATANDAR—*Hereditary Offices Act (Bom. Act III of 1874), secs. 25, 36—Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.*

See HEREDITARY OFFICES ACT ... 101

—*Death of representative Vatandar—Deceased's widow representative Vatandar—Death of the widow—Application by the nearest heir of the deceased male Vatandar for possession—Six months, calculation of—Property claimed by right "in succession"—Inquiry upon solemn declaration—Affidavit upon solemn affirmation—Oaths Act (V of 1840)—Curator's Act (XIX of 1841), secs. 3, 4 and 14.*

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WAKF— <i>Mahomedan law—Gift—Essential elements for validity—Power of revocation—General principles—Vested remainders.</i> [In 1902 a Shia Mahomedan by deed conveyed certain immoveable property to himself and other trustees for himself for life and after his death for the payment of annuities to his widow and daughter and the balance to certain charities. Further clauses provided that on the death of his widow her annuity was to go to certain other charities and that on the death of his daughter a lump sum was to be given to her son. A further proviso reserved power to the settlor at any time to revoke all or any of the above trusts.	
In 1908 he revoked the trust, and executed a mortgage of the property. In 1909 he died and receivers of his estate were appointed.	
His daughter then filed a suit for a declaration <i>inter alia</i> that the revocation and subsequent mortgage were invalid, and that the original trusts still subsisted.	
<i>Held</i> , that the conveyance in 1902 was invalid.	
Looked at from the standpoint of the Mahomedan law-giver, a private trust would be no more than a private gift <i>inter vivos</i> through the medium of the third party, and therefore subject to all the conditions of a valid gift, but <i>quære</i> whether private trusts were known to Mahomedan law.	
<i>Banoo Begum v. Mir Abed Ali</i> (1907) 32 Bom. 172, discussed and distinguished.	
JAINABAI v. R. D. SETHNA (1910) 34 Bom. 604	
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<i>See HINDU LAW</i>	278
WILL— <i>Executor—Testator's direction to carry on his trade—Loss suffered in the course of the business—Mortgage—Liability of the executor—Testator's assets liable.</i> [One Gordhandas made a will and died leaving him surviving his widow, a daughter and her husband and two grandsons by the daughter. Under the will the testator appointed his widow and the daughter's husband executrix and executor and directed among other things that in order to perpetuate his name his business should be carried on by the executor so long as it could be carried on at a good profit but should it appear that the trade will suffer so as to destroy his reputation the executor should stop it. At the time of his death the testator possessed <i>inter alia</i> a cotton spinning factory. The executor and executrix carried on the business in the testator's name for some time and having found that large liabilities were incurred in the course of the business the factory was mortgaged to J. with possession. The mortgage was executed by the testator's	

widow as owner of the firm of Gordhandas and by her daughter. The fact of the will was denied in the mortgage conveyance. The ladies executed the mortgage by affixing their marks and their names were written by the executor. J. sued the mortgagor ladies and the executor to recover the mortgage-debt and obtained a decree. The executor died while the suit was pending. The mortgage property was sold under J.'s decree and was purchased by him at the court-sale. In the meanwhile the beneficiaries under the will, that is, the two grandsons of the testator and the sons of the deceased executor, brought a suit against J. for a declaration that the property was not liable to be sold under the defendant's mortgage-decree and that the defendant had obtained by his purchase no right as against the plaintiffs' rights in the property.

Held, dismissing the suit, that the mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner, the executor, who had the implied authority of the testator to deal with the factory in the ordinary course of business. The mortgage was therefore valid and binding on the executor as principal.

Juggeewandas Keeka Shah v. Ramadas Brijbookun-Das (1841) 2 Moo. I. A. 487, followed.

A mortgage by a trader under a testamentary trust of the testator's property is referable to his implied authority as a trustee and not to his position as executor.

Devitt v. Kearney (1883) 13 L. R. Ir. 45 at p. 52, followed.

An executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors and is entitled to use as a trader the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his co-executor who is not named as a trade trustee.

The trustee, though personally liable for the debts which he contracts in the course of his business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned.

JETHABHAI v. CHOTALAL

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... (1909) 31 Bom. 209

WILL—*Limitation Act* (XV of 1877), secs. 5 and 7—*Application to file an appeal in forma pauperis*—*Delay in making the application*—*Minor applicant*—*Excuse of delay*—*Probate*—*Grant of probate*—*Question of title not affected by the grant*—*Res judicata*—*Civil Procedure Code* (Act V of 1908), sec. 11.

See LIMITATION ACT (XV OF 1877), SECS. 5 AND 7 ... 589

—*Hindu Wills Act* (XXI of 1870), secs. 2 and 5—*Indian Succession Act* (X of 1865), sec. 187—*Administrator-General's Act* (II of 1874), sec. 36—*Will made in Bombay*—*Property worth less than Rs. 1,000*—*Probate*—*Administrator-General's certificate*.

See HINDU WILLS ACT (XXI OF 1870), SECS. 2 AND 5 ... 506

—*Probate and Administration Act* (V of 1881), sec. 81—*Indian Succession Act* (X of 1865), sec. 250—*Probate*—*Caveator*—*Interest possessed by the Caveator*.

See PROBATE AND ADMINISTRATION ACT ... 459

WINDING UP PETITION—*Petitioner a creditor for amount not immediately payable*—*General financial position of company*—*Indian Companies Act* (VI of 1882), secs. 128, 129, 130 and 131—*Scheme of arrangement*—*Practise*. The

definition of "debt" in section 130 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word "creditor." A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor.

If the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up.

If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement. . . . But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourth majority of the creditors is able to bind the minority. Otherwise any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors.

IN THE MATTER OF INDIAN COMPANIES ACT, IN THE MATTER OF THE
BOMBAY COTTON MANUFACTURING COMPANY AND IN THE MATTER OF
RATILAL KARSONDAS ... (1909) 34 Bom. 533.

WITNESS CONTRADICTING HIMSELF—*Criminal Procedure Code (Act V of 1898), secs. 162, 288—Indian Evidence Act (I of 1872), secs. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.*

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